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No. 97-

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES E. McDOWELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

## QUESTIONS PRESENTED

1. Inasmuch as the Eighth Amendment does not require that a capital jury be instructed at all "on its obligation . . . to consider mitigating evidence" and "on particular mitigating factors deemed relevant by the State," *Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109, at *4-5 (Jan. 21, 1998), does a state trial court commit constitutional error when it responds to a jury inquiry on consideration of potentially mitigating factors by referring the jury to responsive and legally flawless, but previously given instructions that clearly called for consideration of all mitigating evidence proffered by the defense?

2. Was the Ninth Circuit's result, in "the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct" dictated, within the meaning of the new rule prohibition of *Teague v. Lane*, 489 U.S. 288 (1989), by the precedent of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), which invalidated a trial judge's refusal to consider relevant mitigating evidence in capital sentencing?

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**IN THE SUPREME COURT OF THE UNITED STATES**

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No. 97- _____

ARTHUR CALDERON, Warden, *Petitioner*,

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CHRLES E. McDOWELL, *Respondent*.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS OR JUDGMENTS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit was reported at 130 F.3d 833 (9th Cir. 1997). The initial opinion of the Ninth Circuit, unanimously upholding the judgment and sentence herein, is reported at 107 F.3d 1351 (9th Cir. 1997). The panel opinion on rehearing, a two-to-one decision upholding the judgment and sentence, is reported at 116 F.3d 364 (9th Cir. 1997). The three slip opinions are reprinted in the Appendix submitted herewith.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit, rendered en banc and after the grant of rehearing, was entered on November 24, 1997. This Petition for Writ of Certiorari followed within 90 days. 28 U.S.C. §

2101(c); Sup. Ct. R. 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

## STATUTORY PROVISION

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

## STATEMENT OF THE CASE

On the afternoon of May 20, 1982, Charles McDowell, while armed with a knife with a 10-inch blade, broke into a residence where he attempted to rape the housekeeper and then stabbed her to death. As McDowell left, he slashed the throat of, but did not kill, an elderly neighbor who had come to the front door to investigate screams he heard coming from the house. In August of 1984, a jury convicted McDowell of one count each of murder, attempted murder, and burglary, and

found true various additional allegations, including the special circumstances of felony-murder/burglary and felony-murder/rape and a prior Florida conviction for lewd, lascivious, and indecent assault on a child.

At the penalty phase of McDowell's trial, the prosecution presented aggravating evidence of two prior crimes: (1) oral copulation and sodomy committed against a four-year old boy; and (2) a brutal assault, including rape, sodomy, and oral copulation, committed against a woman in Florida before McDowell fled to California, where he murdered the housekeeper.

In mitigation, McDowell presented the testimony of family members, a former neighbor, a nurse, and a probation officer in an attempt to show that he had a tragic childhood, was abused by a religious fanatic father, had sincerely wanted help while in a mentally disordered sex offender program, and had benefitted therefrom.

During penalty deliberations, the jury inquired of the court whether it could consider eight listed instances of McDowell's background as mitigation.[1/] Out of the jury's

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1. In its third partial day of penalty deliberations, the jury sent the following written request to the trial judge:

> Direction: We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other eleven jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.

presence, the trial judge voiced concern that the jurors were asking him to interpret the evidence and expressed a desire not to say anything that would be coercive. The trial court then referred the jury to, and instructed the jurors to read, two already given instructions, including the charge that:

> you *shall consider all of the evidence* which has been received during any part of the trial of this case. . . . [and] [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and *any other aspect of the defendant's character or personal history that the defendant offers* as a basis for a sentence less than death.

(Emphasis added.) The trial judge also read to the jury the previously given instruction on weighing and balancing mitigating and aggravating circumstances. The jury foreman affirmed that this had answered the jury's question "for now." The jury resumed deliberations, made

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2. Love/hate relationship with father/mother.

3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.

4. Religious extremes confused defendant.

5. Confusing sexual more's [sic] at home (incest), with mother condoning or aware of incest/abuse.

6. Accused of death of favorite sister.

7. Stress of divorce from family.

8. Rejection of mother's love during teen years.

Thank you.

no further inquiries, and returned a penalty verdict of death.

McDowell unsuccessfully sought relief from the state supreme court, *see People v. McDowell*, 46 Cal. 3d 551, 763 P.2d 1269, 250 Cal. Rptr. 530 (1988), and this Court denied certiorari, *McDowell v. California*, 490 U.S. 1059 (1989). McDowell filed a federal habeas corpus petition, *see* 28 U.S.C. § 2254, which was denied by the district court. McDowell appealed. A three-judge panel of the United States Court of Appeals for the Ninth Circuit first affirmed the denial unanimously, 107 F.3d 1351 (9th Cir. 1997), and then, on rehearing, affirmed by a two-to-one vote, 116 F.3d 364 (9th Cir. 1997). Following a rehearing en banc, the Ninth Circuit, in a seven-to-four division, found that, in light of *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), the trial court's response to the jury inquiry, including referring the jury to legally correct instructions to consider all of the defense penalty evidence, did not dispel the jury's apparent confusion and violated the Eighth Amendment because the referenced instructions had previously been given. The Ninth Circuit vacated McDowell's sentence and instructed the district court to grant the writ and order a new penalty trial in state court. *McDowell v. Calderon*, 130 F.3d at 835, 837, 841, 842, slip. op. at 14010, 14014, 14024, 14025.

## REASONS THE WRIT SHOULD BE GRANTED

### INTRODUCTION

The jury inquired whether it could consider *eight* areas of defense evidence in penalty mitigation. The trial court answered the jury by directing it to the particular language in the previously given instructions which correctly, completely, and responsively addressed the jury's mitigation inquiry, including an instruction that the jury

should consider *all* the defense evidence. Indeed, the instruction in question has been given the effective imprimatur of this honorable Court. The trial court chose the safe and time-tested alternative of referring the jury to pre-existing, well-conceived guiding language rather than, as the Ninth Circuit majority would now require, the inherently hazardous course of replying only with a new, extemporaneous, and ad hoc instructional creation. In making this ruling, the Ninth Circuit en banc majority contradicted other circuits, the state supreme court, a number of its own prior precedents, and common federal and state trial court practice, and inventively found constitutional fault with the method the trial court chose to convey its clear and legally unassailable message.

The Ninth Circuit has set erroneous, unwise, and dangerous precedent, at least in death penalty cases, in a critical area of criminal trial litigation. It has, in effect, imposed (indeed, it has created) a new obligation on state and federal trial courts alike to respond to jury inquiries only with new language.

Granting certiorari herein is also in order because, in an opinion recently issued, *Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109, at *5 (Jan. 21, 1998), this Court rendered a ruling that is controlling herein. A state has no Eighth Amendment obligation to instruct on particular mitigating factors. It follows that replying to a jury inquiry on particular mitigating evidence by referring it to previously given instructions which called for consideration of all proffered defense penalty evidence does not violate the Eighth Amendment.

The en banc majority decision herein is, additionally, one more entry in the Ninth Circuit's journal of circumvention, avoidance, an even nullification of the new rule prohibition of *Teague v. Lane*, 489 U.S. 288 (1989). The majority rationalizes that its invalidation of the jury reinstruction was compelled and dictated by this Court's holding in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

But *Eddings* was not a jury case. *Eddings* involved a trial judge's declination to consider relevant mitigating evidence in capital sentencing. It had nothing to do with the particular method by which a trial court conveys the law in response to a jury question. In light of numerous other recent decisions in which the Ninth Circuit has inappropriately chosen not to apply *Teague*, this Court should grant certiorari here in order effectively to assert its supervisory powers and ensure that its precedents are being followed, as the Constitution envisions, nationally.

## ARGUMENT

### I.

**THE NINTH CIRCUIT HAS CREATED A CONFLICT WITH ESTABLISHED STATE AND FEDERAL PRECEDENT AND PRACTICE, AND HAS IMPOSED AN UNWARRANTED OBLIGATION ON STATE AND FEDERAL TRIAL COURTS, IN RULING THAT THE EIGHTH AMENDMENT RIGHT TO RELIABILITY IN CAPITAL SENTENCING PRECLUDES A TRIAL COURT FROM RESPONDING TO A JURY INQUIRY ON CONSIDERATION OF POTENTIALLY MITIGATING EVIDENCE BY REFERRING THE JURY TO RESPONSIVE AND LEGALLY FLAWLESS, BUT PREVIOUSLY GIVEN, INSTRUCTIONS**

### A. Conflict With Decisions of This Court

Certiorari should be granted herein because the Ninth Circuit's decision is incompatible with the intervening decision of this Court in *Buchanan v. Angelone*, No. 96-8400. The Ninth Circuit's decision was based on the concluded inadequacy of an instruction which covered an area as to which this Court later, in *Buchanan*, found there was no obligation to instruct at all.

Moreover, the Ninth Circuit has misapplied *Eddings v. Oklahoma*, 455 U.S. 104 (1982), a case involving a trial judge's refusal to consider mitigating penalty evidence, in order effectively to invalidate a jury instruction which conforms to this Court's directives.

1. *Buchanan v. Angelone*

**a. Summary Reversal**

The instant Petition has been affected by an intervening event: the January 21, 1998 opinion of this Court in *Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109 (Jan. 21, 1998). The essence of the Ninth Circuit's ruling was that the trial court's instructions on mitigating evidence, although accurate, were inadequate. However, *Buchanan* followed with a statement that instructions on a capital sentencing jury's authority or obligation to consider mitigating evidence are not required by the Eighth Amendment. This subsequent opinion totally undercuts the Ninth Circuit's ruling.[2/] The Ninth Circuit's decision may therefore be reversed summarily.

**b. Substantive Law**

*Buchanan* held that

> [t]he absence of an instruction on the concept of mitigation and of instructions on particular statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments to the United States Constitution,

1998 WL 17109, at *7, and reiterated that there is no obligation to channel or limit the jury's discretion at the

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2. Prior to oral argument before the en banc Ninth Circuit panel, the Court of Appeals notified counsel for both parties to be prepared to discuss *Buchanan*, in which certiorari had recently been granted. (The Order of the Ninth Circuit is reprinted in the Appendix.) However, the Court of Appeals did not inquire about *Buchanan* during oral argument and did not mention this then-pending case in its en banc opinion.

selection phase of sentencing, *id.* at *4-5. Keystoning the Ninth Circuit's en banc decision is the false and contrary premise that a state's obligation to direct and limit a sentencing jury's discretion extends beyond the eligibility stage, *McDowell v. Calderon*, 130 F.3d at 836, slip. op. at 14013-14, and that the trial court was constitutionally obligated to tell the jury (in language beyond that already given and referenced by the court) that the specific evidence to which its note referred came within statutorily defined mitigating factors, *id.* at 838, 841, slip op. at 14018, 14023.

The *Buchanan* trial court refused to give requested instructions that if the jury found certain factors relating to the petitioner's history, mental condition, and conduct to exist, this could be considered in penalty mitigation. *Buchanan*, 1998 WL 17109, at *3. This Court rejected Buchanan's derivative claim of constitutional error, stating that it had never ruled that the Eighth Amendment requires the jury to be instructed "on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." *Id.* The Court went on to say that, while it had decided that a state may not preclude a sentencing jury from considering relevant mitigating evidence, it had never "held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Id.* at *4; *see also Tuilaepa v. California*, 512 U.S. 967, 969 (1994) (no Eighth Amendment violation for state to specify factors for jury to consider in determining penalty without designating individual factors as aggravating or mitigating).

*Buchanan* teaches that a state trial court is not required by the Eighth Amendment to instruct at all that certain defense evidence is mitigating. It follows that an instruction relating defense evidence to statutorily defined mitigating factors which is merely deemed inadequate also is outside the purview of the Eighth Amendment.

Here, when the jury inquired about whether eight areas of defense evidence could be considered mitigating, the trial court, by reference, replied that the jury could consider all defense evidence in its penalty determination.[3] Especially when viewed in light of *Buchanan*, there was clearly no "'reasonable likelihood,'" as a result either of the trial court's message or its method, "'that the jury . . . applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Buchanan*, 1998 WL 17109, at *5, *quoting Boyde v. California*, 494 U.S. 370, 380 (1990).

2. ***Eddings v. Oklahoma***

The proposition that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946) (Frankfurter, J.), is not at issue here.[4] The constitutional question in the instant case is whether

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3. *Any* other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and *any other aspect* of the defendant's character or personal history *that the defendant offers* as a basis for a sentence less than death.

(Emphasis added.)

4. *Bollenbach* did not invoke the United States Constitution, was neither a reinstruction case nor a federal review of state court action, and is distinguished by the fact the trial judge's response to the jury's request for supplemental instruction there was deemed inadequate because the judge "was simply wrong" in what he told the jury. 326 U.S. at 613.

the Eighth Amendment forbids a state trial court from performing this task -- i.e., clearing away the jury's difficulties -- through reinstruction rather than new instruction.[5]

*Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), which the majority describes as "driving" the instant case, *McDowell v. Calderon*, 130 F.3d at 841, slip op. at 14024, held that a capital case sentencer must consider "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Here, the referenced instruction charged the jury to consider:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and *any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death*.

(Emphasis added.)

In short, the trial court here did exactly what this honorable Court said it should do, but the Ninth Circuit says this was not enough. And its says so (1) even though this honorable Court has ruled that language virtually

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5. Although the Ninth Circuit majority speaks in terms of jury confusion and an incorrect belief that the jury could not consider the eight aspects of McDowell's background, designated in the jury note, as mitigating evidence, 130 F.3d at 837, slip op. at 14014, it is questionable that the jury was confused at all. In context, and in light of the jury note's reference to one juror's belief that mitigating circumstances were the "equal" of the aggravating circumstances," *see supra* note 1, the jury's inquiry more likely was directed at weighing and balancing. *See* 130 F.3d at 842 n.1, slip op. at 14025 n.1 (dis. op. of Thompson, J.).

identical to the *unemphasized* portion of the instruction set forth above by itself "permits the defendant to present any evidence to show that a penalty less than death is appropriate to his case," *California v. Ramos*, 463 U.S. 992, 1005 n.19 (1983); (2) even though this Court has ruled that language essentially the same as the *unemphasized* portion of the above instruction does not improperly restrict a jury's consideration of penalty phase mitigating evidence, *Boyde v. California*, 494 U.S. 370, 381-82 (1990); (3) even though the actual presentation of substantial defense penalty phase evidence means that "the context of the proceedings would have led reasonable jurors to believe that evidence of [McDowell's] background and character could be considered in mitigation," *Boyde*, 494 U.S. at 383, and that it is "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade,'" *id.*, *quoting California v. Brown*, 479 U.S. 538, 542 (1987)); *accord Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109, at *5 (Jan. 21, 1998); and (4) even though this Court presumes that juries follow instructions, *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); *accord United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996). By restricting trial courts to composing new instructions, the Ninth Circuit majority's opinion undermines the efficacy of decisions of this Court.

**B. Conflict With Other Circuits**

Re-reading, or referring the jury to, an on-point, legally correct instruction is one long-recognized and practiced option that a trial court may exercise consistent with the Constitution, as the Ninth Circuit has itself in the past acknowledged. *United States v. Papia*, 560 F.2d 827, 843 (9th Cir. 1977) ("it is not error to respond to an inquiry by rereading relevant instructions that properly state the law applicable to the case"); *see also United*

*States v. Hayes*, 794 F.2d 1348, 1352 (9th Cir. 1986) ("[t]he necessity, extent and character of additional instructions are matters within the sound discretion of the trial court" (internal quotation marks omitted)), *cert. denied*, 479 U.S. 1086 (1987); *United States v. Collum*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 466 U.S. 923 (1980).

Other circuits agree with this eminently sound position. *E.g.*, *United States v. Cotton*, 646 F.2d 430, 434 (10th Cir.) (trial court's obligation to respond to jury inquiry may be satisfied by "the simple reading to the jury of an instruction previously given" as long as instruction at issue is accurate). *Accord United States v. White*, 794 F.2d 365, 370 (8th Cir. 1986); *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir.), *cert. denied*, 459 U.S. 975 (1982); *United States v. Andrew*, 666 F.2d 915, 921-22 (5th Cir. 1982); *United States v. Braverman*, 522 F.2d 218, 224 (7th Cir. 1974), *cert. denied*, 466 U.S. 923, 985 (1975). The Ninth Circuit en banc majority has not cited, and Petitioner has not found, any other circuit court decision which has distinguished between capital and noncapital cases in the area of responding to jury inquiry.

The California Supreme Court also properly recognized that, while the trial court could have elected to break new ground and formulate original and off-the-cuff instructional language in response to the jury's inquiry, the trial court acted with constitutional propriety in choosing the alternative of directing the jury to existing language which was both responsive and legally flawless. *See People v. McDowell*, 46 Cal. 3d at 578-79, 763 P.2d at 1285, 250 Cal. Rptr. at 546.

This Court should thus grant certiorari in the instant case to resolve the conflict the Ninth Circuit has created with both federal and state courts.

## C. Unprecedented and Improvident Obligation on Trial Courts

In addition, certiorari should be granted because the Ninth Circuit majority opinion is more than wrongly decided: it is expansive authority which in effect imposes an unprecedented and improvident obligation on both state and federal trial courts. Heretofore, criminal trial courts, in noncapital and capital cases alike, have had the discretion to respond to a jury inquiry either by replying in new language or by rereading or referring to already given instructions. But the en banc majority opinion here deprives trial courts of an effective and proper method of jury instruction. "[I]t forces state trial courts to deviate from accepted, correct instructions." *McDowell v. Calderon*, 130 F.3d at 843, slip op. at 14027 (dis. op. of Thompson, J.).

The inherently hazardous nature of the new-language-only straitjacket in which the Ninth Circuit has encased trial judges is demonstrated by the majority's own creation -- that the jury should have been told that it was free to consider any aspect of McDowell's background and character he offered as mitigating and that "'some, if not all, of the listed factors, could fall within the category.'" 130 F.3d at 841, slip. op. at 14023. As shown above, the first part of the majority's mandatory instructional solution was exactly what the referenced instruction stated. The second part, as Judge Thompson additionally and ably points out in dissent, is itself markedly deficient since it "would have caused the jury to wonder which 'some' of the factors on their list they could consider and whether they could or could not consider all of the factors." 130 F.3d at 843, slip. op. at 14027-28. Petitioner submits that when seven federal appellate judges, operating with months of time, significant support staff, and the inestimably valuable advantage of hindsight, can put forth only such a facially flawed product, it is totally unrealistic

to require a trial judge to engage in extemporaneous deviation from time-tested instructions.

But there is further misfortune here. Because the majority proffers an Eighth Amendment pedigree for its ruling, the new obligation it imposes extends both to state and federal courts. And, because the majority's core concept -- that if instructional language confuses the first time, additional exposure is no cure (130 F.3d at 838, slip. op. at 14018) -- is logically no more valid in the capital sentencing context than any other, the Ninth Circuit has created a judicial eclipse with a limitless penumbra.[6]

Unappreciated by the Ninth Circuit majority is that the very practice of providing juries with *written* versions of the instructions which have been given orally by the trial court is an acknowledgment that repetitive juror reference to instructional language can add to the jury's understanding and make the instructions more effective. Of course, there is no guarantee that jurors who submit questions to the court have actually read every word of

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6. The Ninth Circuit majority seeks to characterize this case as unique and therefore unlikely to affect other cases. The majority's purpose, though, appears not to narrow the scope of its holding, but to cast its ground breaking ruling as not "certworthy" and thus camouflage it from this Court's review. However, the majority's reference to the nonexistence of any "one-size-fits-all" jury response, *McDowell v. Calderon*, 130 F.3d at 840, slip op. at 14020, is a rubric that can be applied to assert any case is unlike all others. The concept that capital cases require more than usual assurances of reliability because "'death is qualitatively different,'" *id.*, slip op. at 14020-21, assumes, with neither logical nor precedential underpinning, that repetition of instructional language does not work in capital cases even though it may in noncapital cases.

the written instructions carefully. Moreover, lay jurors cannot be expected to have full recall of oral or written instructions given to them. Often, both in a courtroom setting and in common human experience as well, a second reading of written material may provide the reader with much more than did the first reading. Referral to pertinent instructions previously given, as opposed to creating original supplemental instructions, is thus a logical and sufficient option as long as the initial instructions accurately and understandably state the law.

## II.

## THE COURT OF APPEALS HAS VIOLATED THE "NEW RULE" PROSCRIPTION OF *TEAGUE V. LANE* IN THIS CASE AND HAS REGULARLY FAILED TO APPLY AND IMPLEMENT *TEAGUE*

### A. Reasonable State Jurists in 1989 Would Not Have Felt Compelled by *Eddings v. Oklahoma* or Any Other Existing Precedent to Hold the Eighth Amendment Prohibited Replying to a Jury's Inquiry on Mitigation by Directing It to Responsive and Legally Correct Written Instructions That Had Already Been Given

In a nutshell, this is "the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct." *McDowell v. Calderon*, 130 F.3d at 843, slip op. at 14028 (dis. op. of Kozinski, J.). By definition, the Ninth Circuit has violated the proscription of *Teague v. Lane*, 489 U.S. 288 (1989), against announcing or applying a new constitutional rule to grant habeas corpus relief.

Under this Court's jurisprudence, and thus as part of "the law of the land," it is fundamental that federal habeas corpus review involving persons in state custody is an extraordinary and limited remedy. *Teague*, 489 U.S. at 316; Richard H. Falon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1747 (1991). Federal "habeas relief is appropriate only if 'a state court considering [the petitioner's] claim at the time his conviction became final would have felt *compelled by existing precedent* to conclude that the rule [he] seeks was required by the Constitution.'" *Gray v. Netherland*, 116 S. Ct. 2074, 2083 (1996), *quoting Saffle v. Parks*, 494 U.S. 484, 488 (1990).[7]

McDowell's conviction became final in 1989 when certiorari was denied in his direct appeal. *See McDowell v. California*, 490 U.S. 1059 (1989). At that time, it was well established that one option a trial judge had in addressing a question from the jury was to reread, or refer the jury to, instructions that were previously given provided that the referenced instructions were responsive to the jury's inquiry and correctly stated the relevant law. *See, e.g., United States v. White*, 794 F.2d 365, 370 (8th Cir. 1986); *United States v. Andrew*, 666 F.2d 915, 921-22 (5th Cir. 1982); *United States v. Cotton*, 646 F.2d 430, 434 (10th Cir.), *cert. denied*, 454 U.S. 861, 102 S. Ct. 316, 70 L. Ed. 2d 159 (1981); *United States v. Collum*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 466 U.S. 923 (1980) *United*

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7. There are two exceptions to the *Teague* prohibition: (1) the new rule renders a class of private conduct beyond a state's proscriptive power; (2) the new rule is a watershed rule of criminal procedure which implicates the accuracy or fundamental fairness of the criminal proceeding. *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990). The Ninth Circuit majority does not assert that either exception is applicable in this case.

*States v. Papia*, 560 F.2d 827, 843 (9th Cir. 1977) *United States v. Braverman*, 522 F.2d 218, 224 (7th Cir. 1974), *cert. denied*, 466 U.S. 923, 985 (1975).

There was no precedent in 1989 that created a constitutional exception for capital cases or for sentencing issues. The Ninth Circuit majority cites none. This is not surprising since the instant case is the first one to do so.

Instead, the Ninth Circuit majority has endeavored to avoid *Teague* by the tactically necessary, but legally insupportable, assertion that its effective invalidation of the death penalty here is somehow dictated by *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). *McDowell v. Calderon*, 130 F.3d at 841, slip op. at 14024.

On its face, the Ninth Circuit's rationale not only fails, but also constitutes precedent for rendering *Teague* meaningless. *Eddings* was a capital case, but it was not a jury case. There, the sentencer was the trial judge, who ruled that he could not consider the defendant's troubled youth as a mitigating factor in his determination of penalty. 455 U.S. at 109. True, the instant case can be compared to *Eddings* in that in each there was an expression related to the sentencer's point of view on consideration of evidence. However, unlike the instant case, the sentencer in *Eddings* was not subsequently exposed to a proper statement of the law.

In other words, the Ninth Circuit's eosinophilic analysis suffers from the "apples and oranges" syndrome. *Eddings* is directed to the scope of evidence; the instant case concerns the method by which the law is communicated to a jury. *See Gilmore v. Taylor*, 508 U.S. 333, 343 (for *Teague* purposes, exclusion of evidence is different from jury instructions which restrict a defendant's ability to present an affirmative defense); *cf. Sawyer v. Smith*, 497 U.S. 227, 232, 234-37 (1990) (holding of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that prosecution argument which diminishes jury's sense of capital sentencing responsibility violates Eighth

Amendment, not dictated by *Eddings* or *Lockett v. Ohio*, 438 U.S. 586 (1978), even though Court relied on these cases in *Caldwell*).

It is, initially, questionable whether a holding that it is improper for a sentencing judge not to consider mitigating evidence can logically lead to a holding that

redirecting a jury to language to consider *all* defense evidence is tantamount to telling it *not* to consider defense evidence. It is, ultimately, indefensible to conclude, as does the Ninth Circuit, the the first holding *compels* the second.[8] At a minimum, "the new-rule doctrine 'would be meaningless if applied at this level of generality.'" *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

The Ninth Circuit majority's opinion herein should not be allowed to stand because it constitutes precedent that undermines other important *Teague* principles: (1) "A rule is not 'dictated by precedent' unless it falls within a narrow description of the facts and outcomes of prior decisions." (2) "The existence of a conflict of authority is prima facie evidence that a rule is not dictated by precedent." (3) "A rule is not dictated by precedent if reasonable state court judges could disagree as to the proper rule." Linda Meyer, "*Nothing We Say Matters*": Teague *and New Rules*, 61 U. Chi. L. Rev. 423, 455-56 (1994) (footnotes omitted).

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8. Even if it could be established that the Ninth Circuit's rule herein was a "logical extension," *Gilmore v. Taylor*, 508 U.S. 333, 350 (1993), or even "the most reasonable" interpretation, of *Eddings* and any progenitors it may have, *Lambrix v. Singletary*, 117 S. Ct. 1517, 1530 (1997), this would not be enough for removal from the *Teague* prohibition, since *Eddings* did not compel the rule.

The circuit court opinions cited above (*see supra* at 18) which support jury reinstruction, constitute convincing evidence both that the Ninth Circuit's rule here is not dictated by precedent and that the California Supreme Court was reasonable in 1989 when it upheld the trial judge's method of responding to the jury here. The State, additionally, submits that the fact a United States district judge and the original Ninth Circuit panel also upheld the trial court is added corroboration for this position.[9] Certainly, in this light, there can be no viable claim that the state supreme court did not render a reasonable and good faith interpretation of existing precedent when it upheld McDowell's conviction. *See Gilmore v. Taylor*, 508 U.S. at 340; Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 512 (this Court "has, in effect, created a good faith exception for state adjudication of federal constitutional claims").

The *Teague* issue herein is also affected by this Court's recent decision in *Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109 (Jan. 21, 1998). In *Buchanan*, the Court decided the Eighth Amendment does not require that a sentencing jury in a capital case be instructed either on the general concept of mitigating evidence or on particular mitigating factors established by statute. *Buchanan*, 1998 WL 17109, at *2, *7.

Thus, the warden submits that *Buchanan* means that, neither henceforth nor in the past, is there or has there been a constitutional requirement that a state must instruct a jury on mitigation generally or on specific mitigating factors, and that, as a corollary, there is no

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9. Indeed, the author of the majority en banc decision at first joined in a unanimous panel opinion. *McDowell v. Calderon*, 107 F.2d 1351 (9th Cir. 1997). Surely, no one would deny that he was a reasonable jurist before he changed his mind on the reinstruction issue.

requirement to instruct, even on request, that particular evidence is mitigating. Even should this Court's opinion later be interpreted as not having gone so far, one thing is certain: the Court did not hold to the contrary. Accordingly, it is clear that, when Petitioner's direct appeal became final in 1989, all reasonable jurists would not have felt compelled to conclude that a state must instruct a capital jury, on request, that particular evidence is mitigating. *See Tuilaepa*, 512 U.S. at 981 ("it follows" from the holding in *Zant v. Stevens*, 462 U.S. 862 (1983), that an incorrect characterization of sentencing factor as aggravating was non prejudicial and "that the failure to characterize factors such as the age of the defendant or the circumstances of the crime as either aggravating or mitigating is also unobjectionable") (conc. op. of Stevens, J.).

Accordingly, even if the Ninth Circuit's decision herein is somehow not invalidated by *Buchanan*, it is surely barred by *Teague* and therefore should be reversed. At a minimum, the matter should be remanded to the Court of Appeals with instructions to decide the case anew, consistently with *Buchanan* and *Teague*.

## B. The Ninth Circuit Has Regularly Failed to Apply and Implement *Teague*

This Court has consistently followed the precedent it set for all federal courts in *Teague* and has consistently enforced and implemented its standards in a variety of different contexts, reminding federal courts not to apply new rules on collateral review. *O'Dell v. Netherland*, 117 S. Ct. 1969 (1997); *Lambrix v. Singletary*, 117 S. Ct. 1517, 1525-28 (1997);*Gray v. Netherland*, 116 S. Ct. 2074, 2083 (1996); *Goeke v. Branch*, 115 S. Ct. 1275, 1276 (1995); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Gilmore v. Taylor*, 508 U.S. 333, 339-40 (1993); *Graham v. Collins*,

506 U.S. 461, 466-67 (1993); *Stringer v. Black*, 503 U.S. 222, 227 (1992); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Butler v. McKellar*, 494 U.S. 407, 412-14 (1990); *Saffle v. Parks*, 494 U.S. 484, 487-88 (1990). In only one case in which this Court has confronted a *Teague* challenge did the Court find the rule to have been dictated by precedent, and therefore not "new." *See Penry v. Lynaugh*, 492 U.S. 302, 329 (1989). To date, this Court has never found an exception to *Teague*.

In contrast, the Ninth Circuit has regularly declined to apply *Teague*'s bar to new rules or has repeatedly declared that a new rule meets *Teague*'s exceptions. *See, e.g., Robbins v. Smith*, 125 F.3d 831, 835 (9th Cir. 1997) (rule invalidating California method for addressing no-merit appellate briefs "predetermined" by *Anders v. California*, 388 U.S. 924 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988)); *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir. 1997) (finding that a Supreme Court opinion *upholding* a commutation instruction dictates *reversing* a death penalty conviction); *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir. 1997) (rule of timeliness of self-representation motions is not "new" ipso facto because it was announced by *Ninth Circuit* prior to petitioner's case becoming final); *Rupe v. Wood*, 93 F.3d 1434, 1440-41 (9th Cir. 1996) (finding *Teague* not implicated by a rule requiring admission of polygraph evidence); *Snook v. Wood*, 89 F.3d 605, 611-13 (rejecting asserted *Teague* bar to requirement that state trial court conduct colloquy with criminal defendant prior to allowing self-representation); *Harmon v. Marshall*, 69 F.3d 957, 966-67 (9th Cir. 1995) (finding reasonable doubt instruction deficient in light of non-habeas Ninth Circuit precedent, and further finding that such error meets *Teague* exception for "fundamental fairness"); *Paradis v. Arave*, 20 F.3d 950 (9th Cir. 1994) (rejecting *Teague* defense on variety of issues without demonstrating identity of claim and prior precedent); *Fetterly v. Paskett*, 15 F.3d 1472, 1477-78 (9th Cir. 1994)

("notwithstanding the [Supreme] Court's crystal clear pronouncements, the panel rushes headlong to apply a new, incredibly broad rule [regarding construction of a criminal sentencing statute] retroactively to petitioner without even explaining why it may do so") (dis. op. of Kozinski, J.); *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995) (finding *Teague* not implicated if underlying issue involves post-conviction proceedings); *Jimenez v. Myers*, 12 F.3d 1474, 1482 (9th Cir. 1993) (disapproving state method for dealing with deadlocked jury despite dissent's claim that "[i]f *Teague* does not bar retroactive application in these circumstances, it has no meaning at all") (dis. op. of Kozinski, J.); *Jimenez v. Myers*, 40 F.3d 976, 981 (9th Cir. 1993) (amended opinion construing trial judge's questions and comments as violating *Allen v. United States*, 164 U.S. 492 (1896), is "far more novel and far more dangerous than what the majority said the last time around") (dis. op. of Kozinski, J., citing *Teague*); *Beam v. Paskett*, 3 F.3d 1303, 1310-11 (9th Cir. 1993) (invoking *Hernon v. Lowry*, 301 U.S. 242 (1937), as justification for refusing to find that *Teague* bars conclusion that trial court's application of "continuing threat" aggravating sentencing factor violates Eighth Amendment, and alternatively finding the holding satisfies both *Teague* exceptions); *Blazak v. Ricketts*, 1 F.3d 891, 898 n.8 (9th Cir. 1993) (rejecting *Teague* defense to rule allowing consideration of evidence never presented in state court on question of mental competence); *Jeffers v. Lewis*, 974 F.2d 1075, 1079-81 (9th Cir. 1992) (finding that Ninth Circuit's new rule regarding trial court's review of mitigation evidence in capital case was "dictated by prior [Ninth Circuit] precedent . . . [and] merely applied the teachings of *Lockett* [*Lockett v. Ohio*, 438 U.S. 586 (1978)] and *Eddings* [*Eddings v. Oklahoma*, 455 U.S. 104 (1982]" and therefore was not subject to *Teague*); *Beam v. Paskett*, 966 F.2d 1563, 1570 n.5 (9th Cir. 1992) (allowing new rule regarding instructional error in capital case as long as "we

have twice [retroactively] applied the rule" on habeas corpus); *Coe v. Thurman*, 922 F.2d 528, 533-34 (9th Cir. 1990) (announcing new rule ordering state appellate court to decide state appeal within a specified time period, and finding "that the new rule *Coe* established is not the kind of rule of which *Teague* applies"); *Robinson v. Borg*, 918 F.2d 1387, 1389-1404 (9th Cir. 1990) (applying new rule regarding equivocal invocation of right to counsel even over dissent's extended discussion of *Teague* bar); *Ostrosky v. State of Alaska*, 913 F.2d 590, 594-95 (9th Cir. 1990) (new rule regarding mistake-of-law defense falls within second exception to new-rule prohibition); *Harris v. Vasquez*, 901 F.2d 724, 726-27 (9th Cir. 1990) (new rule regarding competency of psychiatric assistance "at least arguably" satisfies *Teague*'s fundamental fairness exception).[10]

Consequently, the instant case is not merely an isolated example of the Ninth Circuit's efforts to eschew *Teague*. This case therefore takes its place alongside many others in which the Ninth Circuit has avoided, circumvented, and, in a sense, judicially nullified *Teague* within its territory and announced or applied new rules despite *Teague*'s bar. The total number of such cases is impossible to determine in light of the existence of those

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10. The list of published cases in which the Ninth Circuit has upheld a *Teague* defense is considerably shorter. *See Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997); *Jones v. Gomez*, 64 F.3d 1373 (9th Cir. 1995); *Clabourne v. Lewis*, 64 F.3d 1375 (9th Cir. 1995); *Turner v. Marshall*, 63 F.3d 807 (1995) (*Turner I*); *Woolery v. Arave*, 8 F.3d 1325 (9th Cir. 1995 ); *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991); *Jackson v. Ylst*, 921 F.2d 882 (9th Cir. 1990); *Barker v. Estelle*, 913 F.2d 433 (9th Cir. 1990); *Harris v. Vasquez*, 913 F.2d 606, 622 (9th Cir. 1990); *Allen v. Bunnell*, 901 F.2d 820 (9th Cir. 1990).

like *Marshall v. Turner*, 121 F.3d 1248 (9th Cir. 1997), *petition for cert. filed* (No. 97-1071), in which the Ninth Circuit failed even to respond to the *Teague* defense.

Accordingly, the Ninth Circuit's new ban on the traditional alternative of jury reinstruction deserves the review of the Supreme Court of this nation, for the importance of the substantive issue, the resolution of conflicts with state and federal precedent and practice which it has created, and the maintenance of a truly national court system.

## CONCLUSION

For the reasons set forth above, Petitioner requests that the instant Petition for Writ of Certiorari be granted and that this Court hear the matter fully. There is, however, also another viable alternative. In light of the Ninth Circuit's clear violation of *Teague's* new rule prohibition, and in light of the issuance of the opinion in *Buchanan v. Angelone* after the Ninth Circuit en banc decision herein, summary reversal, based on either *Teague*, *Buchanan*, or both, would be appropriate herein.

Dated: February 19, 1998.

Respectfully submitted,

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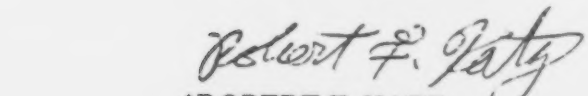

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## EDITOR'S NOTE

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Supreme Court, U.S.
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No. 97- 971414 FEB 23 1998

OFFICE OF THE CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES E. McDOWELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## APPENDIX

## PETITION FOR WRIT OF CERTIORARI

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# Appendix A

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

CHARLES E. McDOWELL,
*Petitioner-Appellant,*

v.

ARTHUR CALDERON, Warden of the California State Prison at San Quentin,
*Respondent-Appellee.*

No. 96-99000
D.C. No.
CV-90-04009-MRP
OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued En Banc and Submitted
August 28, 1997—San Francisco, California

Filed November 24, 1997

Before: Procter Hug, Jr., Chief Judge, James R. Browning, Betty B. Fletcher, Harry Pregerson, Stephen Reinhardt, Melvin Brunetti, Alex Kozinski, David R. Thompson, Stephen S. Trott, Andrew J. Kleinfeld and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Trott; Dissent by Judge Thompson; Dissent by Judge Kozinski

## SUMMARY

### Criminal Law and Procedure/Capital Cases

Sitting en banc, the court of appeals reversed a judgment of the district court. The court held that in a capital murder pros-

ecution, the trial court must clear up the jury's confusion with explicit direction when they indicate an erroneous rejection of aspects of the defendant's personal history as mitigating evidence.

Appellant Charles McDowell was charged with murder with special circumstances and other crimes. The evidence of his guilt was overwhelming. A jury convicted him as charged.

In the penalty phase, the prosecution presented evidence of aggravating factors. In mitigation, defense counsel presented evidence of McDowell's tragic and traumatic childhood.

During the third day of deliberations, the jury asked the trial court to provide direction on whether various events and conditions in McDowell's personal history could be considered as mitigating evidence. In a note they sent to the court, 11 jurors who had already voted for the death penalty indicated that such evidence should not be considered as mitigating, as the holdout juror had done.

Outside the presence of the jury, the trial court concluded that because the jurors had reported that they were divided 11-1 for death, the only way to avoid coercion was to direct them to reread the instructions on aggravating and mitigating factors, and for the court to reread the standard instruction on weighing those factors. Both the prosecution and defense attorneys expressed the view that the factors listed by the jurors in their note were proper for consideration as mitigating evidence. The court advised the jury to review the original instructions and read to them the instruction on weighing.

The jury deliberated further and returned a death verdict.

The California Supreme Court affirmed McDowell's conviction and sentence. The United States Supreme Court denied his certiorari petition. The California Supreme Court

denied McDowell's habeas corpus petition; the United States Supreme Court denied his second certiorari petition.

On federal habeas corpus, the district court granted McDowell leave to file a second state petition to exhaust his claim of ineffective assistance of trial counsel. The California Supreme Court denied the petition. The district court denied McDowell's amended habeas petition, but granted a certificate of probable cause. McDowell appealed.

A divided panel of the court of appeal affirmed. The court granted McDowell's petition for rehearing en banc.

[1] To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and its function in the factfinding process, and must follow these instructions. [2] For a determination of death to stand, the jury's discretion must be suitably directed and limited so as to minimize the risk of arbitrary and capricious action. It is essential that the jurors be properly instructed regarding all facets of the sentencing process. [3] This requirement does not end the moment the judge instructs the jury, but continues until a verdict is reached and returned.

[4] The jury's request for guidance demonstrated that 11 jurors were confused about the law and erroneously believed they could not consider aspects of McDowell's background as mitigating evidence. [5] The jury's disorientation was of constitutional concern. A jury *must* consider the evidence put forward by a defendant in mitigation of his culpable behavior. Such consideration is a constitutional imperative.

[6] Although the jurors had been properly instructed, the *understanding* of 11 of them was as if the trial judge had instructed them to disregard the mitigating evidence McDowell proffered. The factors listed in the note undeniably qualified as mitigating evidence. The State so conceded. Both McDowell's counsel and the prosecutor so advised the trial

judge. Everyone in the courtroom except 11 of the jurors understood that the defendant's mitigating evidence had to be considered by the jury.

[7] The question was whether this fundamental error had any substantial and injurious effect or influence on the jury's sentence of death. The proper inquiry was whether there was a reasonable likelihood that the jury applied an arguably ambiguous instruction in a way that prevented consideration of constitutionally relevant evidence. The result depended on whether the judge's response to the jury's note adequately corrected the 11 jurors' misunderstanding and dispelled their confusion.

[8] As of the moment of the delivery of the note, 11 jurors were outside the channel established by state law as required by the Eighth and Fourteenth Amendments. The risk was that they would impose the death penalty in spite of factors that might have called for a less severe penalty. The jury's deliberations up to this point were constitutionally flawed. [9] The trial judge did not identify the exact problem confounding the 11 jurors. He simply referred them to the same instructions that the jurors did not understand. [10] The record gave no assurance that the jurors understood the law if they read the instructions. [11] Under these circumstances, it would have been folly to presume that the jurors got it right and followed the law.

[12] When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy. When constitutional requirements are involved, proper execution of this duty is a matter of ensuring due process of law as guaranteed by the Fourteenth Amendment. [13] The trial court should have explained to the jury that it was free to consider *any* aspect of McDowell's background or character as mitigating circumstances, and that some, if not all, of the listed factors reasonably could have fallen within that category. [14] The

demonstrable injurious effect and influence of the jury's mistake tainted its verdict.

[15] This holding neither broke new ground nor departed from precedent. It represented a routine application of well-settled law to the facts of this case.

Joined by Judges Brunetti, Kozinski, and Kleinfeld, Judge Thompson dissented, writing that it could not be assumed that the jurors remained confused after the trial court directed them to an instruction stating that they could consider the facts listed in their question as mitigating evidence.

Judge Kozinski authored a separate dissent, stating his view that whatever the merits of the new rule enunciated by the majority, it could not be applied on collateral review.

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## COUNSEL

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## OPINION

TROTT, Circuit Judge:

On May 20, 1982, Charles E. McDowell, Jr., killed Paula Rodriguez. Following this grisly homicide, a jury convicted him of various crimes, including murder committed with the special circumstances of burglary and rape, and sentenced him to death. After exhausting his claims for relief in state court, he filed a petition for a writ of habeas corpus in federal

district court, which was denied. He appealed, and a divided three-judge panel of this court affirmed the district court. The panel's opinions, which fully recite the facts and the procedural background of this case, are reported at 107 F.3d 1351 (9th Cir. 1997), *amended and superseded in part by* 116 F.3d 364 (9th Cir. 1997).

By a vote of our active judges, the matter has been reheard en banc. We now vacate that part of the panel's opinion designated as "C. Supplemental Introduction," *id.* at 1358, leaving intact those parts affirming McDowell's convictions and deciding other issues. We have decided as to the remaining issues that the alleged misunderstanding of the jury regarding whether it could consider certain mitigating penalty phase evidence amounted to fatal constitutional error. We believe (1) the jury misunderstood a critical aspect of its task, and (2) that misunderstanding had a substantial and injurious effect and influence on its verdict of death, an effect which in all reasonable likelihood survived the trial court's ineffective attempt to cure it. Thus, we vacate McDowell's sentence of death and remand to the district court with instructions to grant the writ and to order a new trial in state court on the penalty phase of this case.

I

The alleged error we examine occurred during the third day of jury deliberations in the penalty phase.[1] Although both parties agree that the jury members had been adequately instructed on the relevant law and they had the written instructions with them, the jurors sent a note to the trial judge which stated:

> We, the jury in the above entitled action, request the following:

[1]With thanks to Judge Thompson, we borrow heavily from his excellent presentation of this issue in his majority opinion for the panel.

> Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence *that should be considered.* Please advise which following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.
>
> 2. Love/hate relationship with father/mother.
>
> 3. Daily extreme mental and physical abuse by father, also witness to daily abuse to mother and siblings.
>
> 4. Religious extremes confused defendant.
>
> 5. Confusing sexual mores at home (incest), with mother condoning or aware of incest/abuse.
>
> 6. Accused of death of favorite sister.
>
> 7. Stress of divorce from family.
>
> 8. Rejection of mother's love during teen years.
>
> Thank you.

(Emphasis added).

In a hearing outside the presence of the jury, the state trial court said:

> I feel I cannot say anything in light of the sentence which indicates which way they are voting, and anything I say at this particular time will be coercive.

. . .

> They are asking me to interpret the evidence; something I cannot do.

Counsel for McDowell took the position that "the question could be answered; that the mitigating — or the circumstances, the circumstances named, are proper circumstances."

The state trial court responded to the jury's question:

> You're asking me, in essence, to decide the case for you. You have been instructed as to the law and *I hate to throw you out like this.*
>
> But if you go back and read the instructions, in particular you have one instruction in which the mitigating and aggravating factors are listed.
>
> Then you have another instruction, the concluding instruction which reads as follows:
>
> "One mitigating circumstance may outweigh several aggravating circumstances or one aggravating circumstance may outweigh several mitigating circumstances. You shall give each the weight to which you find it to be entitled."
>
> Those are the two instructions that I think really apply. I would ask you to go back, reread those instructions. . . .

(Emphasis added).

After a brief conference at the bench between court and counsel, the court asked the foreman, "Does that answer your question for now?" The foreman answered, "Yes, sir."

The jury resumed deliberations on Friday afternoon and, after a weekend break, returned a verdict of death.

II

[1] A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions.

[2] The Supreme Court has made it abundantly clear, in a series of cases going back to 1976, that for a jury determination of death to stand against Eighth Amendment scrutiny, the jury's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)) (opinion of Stewart, Powell and Stevens, JJ.).

> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." *It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance"* and that "make rationally reviewable the process for imposing a sentence of death." As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sen-

> tencing like that found unconstitutional in *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] could occur."

*Godfrey*, 446 U.S. at 428 (citations and footnotes omitted) (emphasis added). The Court reiterated this message in *Walton v. Arizona*, 497 U.S. 639, 653 (1990), saying, "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."

[3] *Gregg*'s requirement that a jury be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" surely does not end the moment the judge instructs the jury, but continues until a verdict is reached and returned. As they work towards a verdict, the jurors must stay in the channel charted for them by state law. To this end, they may need ongoing guidance.

III

[4] In the matter before us, we confront a case of serious jury mistake and confusion. The plain language of the jury's request for guidance demonstrates that eleven jurors were confused about the law and erroneously believed they could not consider eight aspects of McDowell's background as mitigating evidence.

[5] Given the Eighth Amendment rules mandated by the Supreme Court in *Furman*, *Gregg*, and their offspring, the jury's legal disorientation is of constitutional concern. According to these rules, a jury *must* consider the evidence put forward by a defendant in mitigation of his culpable behavior. Such consideration is a constitutional imperative. As a plurality of the Court said in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), five years before McDowell's trial:

> There is no perfect procedure for deciding in which cases governmental authority should be used to

> impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

A majority of the Court repeated this message in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), five months before the murder for which McDowell stands convicted. The issue in *Eddings* was not the constitutionality of a limiting statute as in *Lockett*, but of a sentencing trial judge's conclusion that he could not "in following the law . . . consider the fact of this man's violent background." *Id.* at 112-13 (internal quotations omitted). The Court interpreted this statement to mean that "the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence." *Id.* at 113 (emphasis in original). In reversing the judgment of death, the Court offered this reasoning:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider *as a matter of law*, any relevant mitigating evidence. In this instance, *it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf.*

*Id.* at 113-14 (second emphasis added). It follows as night the day that although the jury determines the appropriate weight to be given to the mitigating evidence, the jury "may not give it no weight by excluding such evidence from their considerations." *Id.* at 115.

[6] The jury's mistake and confusion in the instant case communicated to the judge in its note squarely fit within the teaching of *Lockett* and *Eddings*. Although the jurors had been properly instructed, the *understanding* of eleven of them —shades of *Eddings*—was "as if the trial judge had instructed [them] to disregard the mitigating evidence [McDowell] proffered on his behalf." *Id.* We repeat the jury's note in relevant part:

> We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances *as being either testimony or evidence that should be considered.* Please advise *which following circumstances can be considered mitigating circumstances.*

(Emphasis added). The factors then listed in the note undeniably qualify under *Lockett* and *Eddings* as mitigating evidence. *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (evidence is mitigating if it "might serve 'as a basis for a sentence less than death' ") (quoting *Lockett*, 438 U.S. at 601). The State so concedes on appeal. Both McDowell's counsel and the prosecutor so advised the trial judge. The prosecutor forthrightly said, "Well, I don't know if it is taking sides but those [factors listed by the jurors] are proper factors to consider." McDowell's counsel requested that the jurors be told that the matters to which the note referred could be considered as mitigating factors. Thus, everyone in the courtroom understood that the defendant's mitigating evidence must be considered by the jury; everyone, that is, *except eleven of the jurors*—the most important participants at that stage of the proceedings.

[7] The question, then, is whether this fundamental error had any "substantial and injurious effect or influence" on the jury's sentence of death, *Brecht v. Abrahamson*, 507 U.S.

619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). To answer this question, we look for specific guidance to *Boyde v. California*, 494 U.S. 370 (1990). In *Boyde*, the Supreme Court confronted a claim that an arguably ambiguous jury instruction "restrict[ed] impermissibly a jury's consideration of relevant [penalty phase] evidence. . . ."[2] To evaluate such a claim, the Court fashioned a reviewing yardstick which we find appropriate here: "The proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence." *Id.* at 380. If the answer is "yes," the error necessarily satisfies the *Brecht* test for substantial and injurious error. Accordingly, the ultimate result here depends on whether the trial judge's response to the jury's note adequately corrected the eleven jurors' misunderstanding and dispelled their confusion. We conclude on these facts, in these circumstances, and in the light of controlling authority that the error did substantially injure and influence the jury's verdict. We so conclude for three main reasons.

[8] First, as of the moment of the delivery of the note, eleven jurors were outside of the channel established by state law as required by the Eighth and Fourteenth Amendments. The risk created by this legal derailment was that they would impose the death penalty "in spite of factors which . . . [might] call for a less severe penalty." *Lockett*, 438 U.S. at 605. The Supreme Court has identified this risk as one "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* It follows that the jury's deliberations up to the point they asked the judge for help were constitutionally flawed.

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[2]The challenged instruction was an earlier version of the "factor (k)" instruction used in McDowell's trial. That earlier version was found lacking in sufficient guidance by the Supreme Court of California in *People v. Easley*, 34 Cal. 3d 858, 878 n.10 (1983). *See* California Jury Instructions, Criminal 8.85(k) (5th ed. 1988) for a later refinement of the instruction; *Boyde*, 494 U.S. at 374 n.2.

[9] Second, the trial judge did not identify the exact problem confounding the eleven jurors. He simply referred the jurors to the original instructions defining mitigating circumstances. The jurors had these instructions with them all along. Both sides agree the instructions were technically flawless. They were, however, the same instructions that for some unknown reason eleven of the jurors did not correctly understand in the first place. Under these circumstances, we agree with Justice Broussard of the California Supreme Court: "There is no point in reiterating language which has failed to enlighten the jury." *People v. McDowell*, 46 Cal. 3d 551, 581 (1988) (Broussard, J., dissenting in part.)

[10] Third, even presuming that the jurors read the instructions after returning from their attempt to obtain guidance from the court, the record gives us no assurance whatsoever that they then understood the law. All we know for sure is that the eleven jurors who initially did *not* understand that the law required them to consider McDowell's mitigating evidence eventually voted as they had while under the influence of their initial error.

[11] Judge Thompson's dissent argues that "there is nothing complicated about the instruction to which they were referred." Even if this characterization is correct, it is irrelevant. The fact is that *this* jury did not comprehend it. Under these circumstances, it would be folly to presume—as we usually do—that in the end they got it right and followed the law. The foreman's affirmative response to the judge's parting inquiry about whether he had answered their question proves little. The response was perfunctory. It came without conversation with the rest of the jurors and before the jurors had any opportunity further to study the instruction to which the court had referred.

[12] Jurors' uncorrected confusion regarding the law may lead to verdicts reached outside of the channel required by *Godfrey* and the Eighth Amendment. This risk was identified

in *Lockett*. The unremarkable prescription for such confusion is that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). As the Seventh Circuit has said, *Bollenbach* places on the trial judge "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem." *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir. 1982). This duty exists, among other reasons, because " '[i]n a trial by jury . . . , the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' " *Bollenbach*, 326 U.S. at 612 (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)). Moreover, when constitutional requirements are involved, the proper execution of this duty is a matter of insuring due process of law as guaranteed by the Fourteenth Amendment. *Cf. Estelle v. McGuire*, 502 U.S. 62 (1991) (jury instruction violates Due Process Clause if it affects an identifiable constitutional right).

We fully understand the trial judge's worry about saying anything that might coerce the jurors towards a verdict. The jury's unexpected revelation that they stood 11-1 for death created a need for caution. Nevertheless, the response given to their question did not adequately clear away the jurors' difficulty and place them on the right track. We realize that the manner in which this clarifying task must be done is within the sound discretion of the trial court, and that the federal Courts of Appeal have approved in some federal cases (which the State brings to our attention), the practice of simply rereading or referring the jurors to the instructions already read. However, *none* of those cases in their facts and circumstances are on a par with the instant case. In *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979), for example, the jury's question did not relate to a matter of constitutional concern and the meaning of the note was merely "unclear." Consequently, we found no abuse of discretion in the trial judge's response, which was to reread the relevant instructions and to invite further questions "should the confusion persist." *Id.* at

631. Therefore, *Collom*, which was not a death penalty case, is easily distinguishable from our case.

McDowell's case is akin to *United States v. Warren*, 984 F.2d 325, 330 (9th Cir. 1993) wherein we held that

> [i]n responding to the jury's inquiry in [the circumstances of that case] "it [was] not sufficient for the court to rely on more general statements in its prior charge." *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989). Referring the jury back to the original instruction would not correct the apparent impression of at least some jurors that intent "to hurt" rather than "to kill" might be sufficient to convict Warren of first degree murder. The Court should have provided a supplemental instruction sufficient to clear up the uncertainty that the jury had brought to the Court's attention.[3]

There is no one-size-fits-all response to jury disorientation, and the sizes that may fit other facts and circumstances do not fit this case. As the Supreme Court has said many times, "the penalty of death is qualitatively different from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett*, 438 U.S. at

[3]*See also United States v. Gordon*, 844 F.2d 1397, 1401-02 (9th Cir. 1988) (error to rely on original instruction where jury expressed confusion regarding conspiracy counts); *United States v. Walker*, 575 F.2d 209, 213 (9th Cir. 1978) (trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion); *United States v. Bolden*, 514 F.2d 1301, 1308-09 (D.C. Cir. 1975); (trial court rereading statute and standard instruction was insufficient where jury showed confusion); *United States v. Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975) (giving cursory supplemental instruction in face of jury confusion was insufficient); *Powell v. United States*, 347 F.2d 156, 157-58 (9th Cir. 1965) (responding to a jury's inquiry by merely rereading a facially correct instruction may be inadequate).

604 (internal quotations and citations omitted). To echo here what the Supreme Court said in *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988), "[n]o one on this court was a member of the jury that sentenced [Charles McDowell]. We cannot say with any degree of confidence which interpretation [of the instructions McDowell's] jury adopted [after meeting with the trial judge]. . . . The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." Moreover, *Mills* observed that "[i]n reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." *Id.* at 376 (citing *Lockett*, 438 U.S. at 605). The *Mills* Court also quoted from *Andres v. United States*, 333 U.S. 740, 752 (1948):

> That reasonable men might derive a meaning from the instructions given other than the proper meaning of [the statute] is probable. In death cases doubts such as those presented here should be resolved in favor of the accused.

*Id.* at 377. As Justice O'Connor said in her concurring opinion in *Eddings*, "*Woodson* [*v. North Carolina*], 428 U.S. 280 (1976) and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factor actually considered by [the sentencing body in imposing a judgment of death]." *Eddings*, 455 U.S. at 119.

We respectfully reject our dissenting colleagues' suggestion that we regard the jury as "too ignorant" to understand the law. We do nothing of the sort. While Judge Thompson's dissent is comfortable speculating that the jurors sorted out their confusion, we are not—especially when a life is at stake.

We also respectfully reject Judge Thompson's notion that our holding "forces state trial courts to deviate from accepted, correct instructions." We find two problems with this assertion. First, it entirely misses the defining aspect of this case:

it was the *jurors* who had deviated from the instructions. Expecting judges to set jurors straight with respect to a constitutional imperative can hardly be regarded—as our dissenting colleagues do—as immersing them in a "sea fraught with peril." Second, Judge Thompson's dramatic metaphor overlooks and misapprehends the very nature of jury instructions. Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words and terms comprehensible to the layperson. The texts of "standard" jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong.

By way of illustration, the jury instructions used in this case came from "California Jury Instructions Criminal," a highly regarded work known as CALJIC. CALJIC is the product of the long-standing Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles, California. As excellent and as useful as they are, CALJIC's instructions are only recommendations and do not carry the force of law. *See* CALJIC, Introduction (West 6th ed. 1996) (quoting Section 5 of the California Judicial Council's Standard of Judicial Administration). In fact, CALJIC emphasizes that "[a] trial judge in considering instructions to the jury shall give no less consideration to those submitted by the attorneys for the respective parties than to those contained in the latest edition of . . . [CALJIC]." *Id.* All trial judges, prosecutors, and defense attorneys in California understand both value of CALJIC recommendations, and their limitations.

Our own Ninth Circuit Manual of Model Jury Instructions stands on a similar footing. It begins with this caveat:

> "It should be emphasized that the instructions in this Manual are *models* and are not intended to be pattern

> instructions. They must be reviewed carefully before use in a particular case. They are not a substitute for the individual research and drafting that may be required in a particular case, nor are they intended to discourage judges from using their own forms and techniques for instructing juries."

9th Cir. Man. of Model Jury Instr., Introduction (West 1996) (emphasis added).

**[13]** If the routine task of instructing a jury with attention to the views of the parties involves navigating a "sea fraught with peril," it is navigation recommended and encouraged by us and mandated in California. It is navigation that trial judges in this circuit, both state and federal, successfully complete every day of the week. To trial judges, settling jury instructions and answering jurors' questions about them is a common task—not easy, but not treacherous either. Indeed, the California Supreme Court itself observed in affirming McDowell's sentence that the trial court "properly could have explained to the jury that it was free to consider *any* aspect of a defendant's background or character which defendant offered as a mitigating circumstance, and that some, if not all, of the listed factors, reasonably could fall within the category." *People v. McDowell*, 46 Cal. 3d at 578. In our view, the trial judge not only "could" have done this, but after *Eddings* he was required to take appropriate steps to preserve McDowell's right to a proper decision by the jury grounded in the Constitution. Lacking such concrete instruction to the jury, and using the *Boyde* test as a guide, we conclude "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." 494 U.S. at 380. At the least, the record bespeaks "grave doubt" on this critical issue, which means that the "petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

**[14]** We are mindful of the "strong policy against retrials years after the first trial where the claimed error amounts to

no more than speculation." *Boyde*, 494 U.S. at 328. We conclude, without speculating, that it is reasonably likely that the jurors erred in their application of this critical instruction. Therefore, we adhere to the equally "strong policy in favor of accurate determinations of the appropriate sentence in a capital case. . . ." *Id.* Parenthetically, the Supreme Court in *Boyde* had to presume possible confusion from an ambiguous instruction. *Id.* Here, we *know* that eleven of the jurors were proceeding on an erroneous premise. Accordingly, we reverse the district court on this discrete issue. We conclude that the demonstrable injurious effect and influence of the jury's mistake tainted its verdict.

## IV

This conclusion requires us to address the State's argument that McDowell improperly asks us for the retroactive benefit of a new rule of constitutional law, in contravention of *Teague v. Lane*, 489 U.S. 288 (1989). We reject this argument. *Furman*, *Gregg*, and *Godfrey* all predate Ms. Rodriguez's death. *Eddings* preceded McDowell's crime by five months, and preceded his trial by over two years. The State's argument that we have never before elevated *Bollenbach* to a constitutional level is off target. *Bollenbach* is not driving this case; *Eddings* is. The core constitutional issue here arises not from the response of the judge, but from the material misunderstanding of the jurors. The judge's well-intentioned but inadequate response is germane, but only insofar as it did not ameliorate the injurious condition threatening to deprive the defendant of his constitutional right to have the jury consider his mitigating evidence.

**[15]** This holding neither "breaks new ground," nor departs from precedent. *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague*, 489 U.S. at 301). It represents a routine application of well settled law to the facts of this case. *Bollenbach* itself did not establish a new rule, it merely reasserted the long-standing axiom that the American judge is the

neutral law-giver in criminal cases. *See Todd v. United States*, 158 U.S. 278 (1895); *Quercia v. United States*, 289 U.S. at 469. As Justice Frankfurter said in *Bollenbach*, "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." 326 U.S. at 612.

Thus, as to the judgment of death, we reverse the district court and remand the matter to the district court with instructions to grant the writ as to McDowell's sentence of death.

REVERSED and REMANDED.

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THOMPSON, Circuit Judge, dissenting, with whom Judges Brunetti, Kozinski, and Kleinfeld join.

The question before us is: can we assume the jurors remained confused after the state trial court directed them to an instruction which, in no uncertain terms, stated they could consider the factors listed in their question as mitigating evidence.[1] I remain convinced that we cannot make this assumption.

In response to the jury's question, the state trial court referred the jury to an instruction which listed the factors the jury "shall" consider. One of these factors required the jury to consider:

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[1]It is questionable whether the jurors were confused at all. Their question can easily be read as one indicating *disagreement* about whether the matters they listed, such as "rejection of mother's love during teenage years," were of sufficient mitigating force to extenuate the defendant's grisly crimes of sexually assaulting and stabbing to death Ms. Rodriguez. In response, the trial court correctly told the jurors he could not decide this for them.

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death.

There is no question that this instruction accurately set forth the law. *See Boyde v. California*, 494 U.S. 370, 381-82 (1990). The instruction also is directly responsive to the jury's question because the instruction clearly tells the jurors they can consider anything in McDowell's background as mitigating evidence.

The majority assumes the jury remained confused after being directed to this instruction. Such an assumption requires us, as a federal court, to speculate that the state court jurors either did not read the instruction to which they were referred, or if they read it they were too ignorant to understand it. This not only usurps the function of the jury, it denigrates the state trial process, and it is plainly wrong.

Jurors are presumed to follow the instructions. *See United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996). There is nothing complicated about the instruction to which they were referred. It tells the jurors quite simply that they can consider not only the matters specifically listed in the instruction, but "any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death." What could be clearer than that? The majority either concludes "any" doesn't mean "any," or the majority simply erases this part of the instruction from the record.

It is no answer to speculate that the admittedly correct instruction confused the jury. How often in human experience have we proved true the admonition: "When all else fails, read the instructions!" Who hasn't, when stymied by some task, finally read or reread the instructions and then understood what to do? This bit of common sense applies here. We

know the state trial judge read the instructions to the jury before they retired to deliberate. We know the jury had the instructions in the jury room. We don't know, however, whether, at the time the jurors returned to court with their question, they had focused on the instruction to which the court referred them. We do know that after the court referred them to this instruction and told them to go back and read it, they returned to court thereafter, not with a further question, but with a unanimous verdict calling for the death penalty. In the face of all of these facts, the majority engages in a series of speculations in order to set aside the defendant's sentence of death.

The majority's conclusion is wrong. Moreover, it forces state trial courts to deviate from accepted, correct instructions. This forced deviation compels state courts to embark upon unfamiliar seas fraught with peril. The majority opinion illustrates this.

The majority states that in responding to the jury's question, the trial judge should have instructed "the jury that it was free to consider any aspect of a defendant's background or character which defendant offered as a mitigating circumstance, and that *some, if not all,* of the listed factors [in the jury's question], reasonably could fall within the category." (Emphasis added). This won't do.

The first part of the majority's suggested instruction, of course, is precisely the instruction to which the state trial court referred the jury when it told them they could consider "any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death." The rest of the majority's suggested instruction, however, illustrates the problem of deviating from jury instructions which correctly instruct the jury on the applicable law. The majority's suggested instruction would have caused the jury to wonder which "some" of the factors on their list they could consider and whether they could or could not con-

sider all of the factors. The trial judge wisely did not give such an instruction. Instead, he referred the jurors to the correct instruction that told them they could consider *any* factor offered by the defendant.

For sound reasons, we have approved a practice of referring the jury to an original instruction when that instruction is responsive to the jury's question and correctly instructs the jury on the applicable law. *See United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979). This is what the state trial court did in this case and it did not err when it did so.

I respectfully dissent.

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**KOZINSKI,** Circuit Judge, dissenting.

This is, so far as I know, the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct. Whatever the merits of this rule—and I agree with Judge Thompson that there is not much—such an extraordinary departure from established law may not be applied on collateral review. *See Teague* v. *Lane*, 489 U.S. 288 (1989).

Our rule has always been that a trial court may "respond to an inquiry from the jury by rereading relevant instructions that properly state the law applicable to the case." *United States* v. *Papia*, 560 F.2d 827, 843 (9th Cir. 1977). The majority somehow concludes—based on "shades of *Eddings*" —that principles of reliability in capital sentencing required a new, more detailed supplemental instruction in this case. *See* maj. op. at 14016. But *Teague* directs us to "survey the legal landscape . . . and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the

Constitution." *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994) (citations and internal quotation marks omitted).[1] McDowell's conviction became final in 1989. *See McDowell* v. *California*, 490 U.S. 1059 (1989) (denying petition for certiorari on direct appeal). A glimpse at the legal landscape reveals that never before has any court held that a judge must give a new supplemental instruction rather than refer the jury to the relevant, legally correct instructions already given. Not in 1989; not ever until today. This fact alone may not be dispositive: Every case is different, and every case requires judges to patiently peruse the relevant case law and distill the right answer. If existing precedent compels the result—even if it's not spelled out in a single case—the state court must apply it. But the state court need not consult a crystal ball to figure out what rabbit the federal courts are next going to pull out of a hat.

The trial judge here could have set out on an eternal quest through the library stacks without discovering the grail which the majority heralds. The line of cases following *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946), leads to an unremarkable conclusion: When a trial court responds to a jury's question, it cannot give an answer that is misleading, nonresponsive or legally incorrect.[2] This tells us nothing about a

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[1]Neither McDowell nor the majority argues that the rule here falls within either of the two exceptions to *Teague*.

[2]The key passage in *Bollenbach*, 326 U.S. at 612-13, began by stating the obvious: "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach*'s holding, however, was not so abstract. The Court held that it was error to give a new instruction that was legally incorrect: "In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. But he was not even 'cursorily' accurate. He was simply wrong." *Bollenbach*, 326 U.S. at 613.

The instructions in *United States* v. *Gordon*, 844 F.2d 1397, 1401 (9th Cir. 1988), *United States* v. *Walker*, 575 F.2d 209, 213-14 (9th Cir. 1978), *United States* v. *Bolden*, 514 F.2d 1301, 1308-09 (D.C. Cir. 1975), *United States* v. *Petersen*, 513 F.2d 1133, 1135-36 (9th Cir. 1975) and *Powell* v.

case where the court gives an instruction that is *correct*. The majority must therefore invoke *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), which it does: "*Bollenbach* is not driving this case; *Eddings* is." Maj. op. at 14024. The argument seems to be that because death is different, the usual assumption—that jurors will read, understand and follow legally correct instructions—is trumped by a new presumption of abiding stupidity.

Does *Eddings* really stand for this proposition? I can't find it anywhere in that opinion. The trial judge in *Eddings*, who was also the sentencer, ruled that he could not consider the defendant's troubled youth as a mitigating factor. *Eddings*, 455 U.S. at 109. The Supreme Court reversed and held that the sentencer in a capital case must consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 110, quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). The Court noted that the judge's misunderstanding of the law was tantamount to a legally incorrect instruction: "In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf." *Id.* at 114. *Eddings*

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*United States*, 347 F.2d 156, 157-58 (9th Cir. 1965) were all either misleading or nonresponsive. *See Gordon*, 844 F.2d at 1401 (holding that supplemental instruction must respond to jurors' question); *Walker*, 575 F.2d at 214 ("The problem is simply that the first supplemental instruction, when viewed in light of the jury's first question, is confusing[."); *Bolden*, 514 F.2d at 1308 (holding that rereading instruction was nonresponsive because "the problems raised by question one were not resolved by the court's further charge"); *Petersen*, 513 F.2d at 1135 (holding that supplemental instruction was "erroneous, misleading and contradictory"); *Powell*, 347 F.2d at 157-58 (holding that where question has two possible meanings, supplemental instruction which is responsive to one meaning but misleading as to the other is error). The last case on which the majority relies, *United States* v. *Warren*, 984 F.2d 325, 330 (9th Cir. 1993), was decided after McDowell's conviction became final and cannot enter the *Teague* analysis.

is about prohibiting consideration of mitigating evidence, not curing juror confusion.[3]

When McDowell's jury returned a note expressing confusion about mitigating factors, it may have been in the same position as the trial judge in *Eddings*. A fair reading of the note suggests the jury may not have been considering the mitigating evidence the defendant had proffered. Did the trial court make the same legal mistake as the judge in *Eddings*? Did it effectively "instruct [the] jury to disregard the mitigating evidence [the defendant] proffered on his behalf?" Just the opposite. The trial court assiduously applied *Eddings* by referring the jury to the relevant instructions about mitigating evidence. The majority agrees that these instructions were technically flawless: The instructions directed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death." *Compare Eddings*, 455 U.S. at 110. Not only were the instructions absolutely correct, they incorporated the precise holding of *Eddings*.

*Eddings* said nothing at all about whether legally correct instructions can cure juror confusion about mitigating evidence. My colleagues in the majority implicitly acknowledge this when they summon their new rule from "shades of *Eddings*."[4] But *Teague* works in black and white, not shades,

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[3]The Supreme Court's later treatment of the case confirms that my colleagues are overreaching. For *Teague* purposes, the Court has explained, the rule of *Eddings* is simple: A state may not "impose[ ] an absolute prohibition against consideration of certain mitigating evidence by the sentencer." *Sawyer* v. *Smith*, 497 U.S. 227, 236 (1990) (applying *Teague*).

[4]The majority notes that *Eddings* applied and confirmed principles of reliability in capital sentencing and holds that these principles dictate the result McDowell seeks. *See* maj. op. at 14015-16. But the Supreme Court has squarely rejected this approach of framing the *Teague* inquiry at such a high level of abstraction: "In petitioner's view, [the rule sought] was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality." *Sawyer* v. *Smith*, 497 U.S. 227, 236 (1990).

penumbras, nuances or emanations. As the Supreme Court explained in *Sawyer*: "Even were we to agree with petitioner's assertion that our decisions in *Lockett* and *Eddings* inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that petitioner seeks." *Sawyer* v. *Smith*, 497 U.S. 227, 236 (1990) (internal quotation marks omitted). Here, as in *Sawyer*, no state court "considering the defendant's claim at the time his conviction became final would have felt *compelled by existing precedent* to conclude that the rule he seeks was required by the Constitution." *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994) (emphasis added) (citation omitted). Because the trial judge did all that *Eddings* required him to do, the rule the majority announces is new and may not be applied on habeas.

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# Appendix B

FOR PUBLICATION

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES E. McDOWELL,
*Petitioner-Appellant,*

v.

ARTHUR CALDERON, Warden of the California State Prison at San Quentin,
*Respondent-Appellee.*

No. 96-99000

D.C. No. CV-90-04009-MRP

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
November 21, 1996—San Francisco, California

Filed February 26, 1997
Amended May 23, 1997

Before: Charles Wiggins, David R. Thompson and Stephen S. Trott, Circuit Judges.

Opinion by Judge Thompson; Partial Concurrence and Partial Dissent by Judge Trott

## SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court. The court held that in a capital murder prosecution,

defense counsel's delay in obtaining drug testing that produces no significant result does not establish ineffective legal assistance, when the other evidence shows no intoxication of the defendant at the time the sample was taken, or destabilization of the sample at the time of testing.

Appellant Charles McDowell was charged with murder and other crimes with special circumstances. The evidence of McDowell's guilt was overwhelming. About a year after his arrest, McDowell informed a defense paralegal that on the day of the murder, he had ingested alcohol and controlled substances. About a month later, defense attorney Gillingham ordered testing of blood and urine samples obtained from McDowell on the day of his arrest. Both the tests and the police report of testing on the day of McDowell's arrest showed no significant presence of drugs or alcohol.

Gillingham retained mental health experts, including Drs. Vicary, Maloney and Murphy. Murphy produced a report that was extremely damaging to McDowell; Vicary and Maloney received copies. Gillingham decided not to call any mental health expert during the penalty phase.

During the guilt phase, Gillingham conceded guilt, but asserted that McDowell did not have the intent to kill required to establish the special circumstances. He asserted that McDowell had assaulted the victim only for the purpose of raping her, and had used the murder weapon only to threaten her. The jury deliberated for two days before returning a guilty verdict.

In the penalty phase, the prosecution presented evidence of a conviction for lewd and lascivious conduct involving Curtis M., and an uncharged rape involving Patricia H. In mitigation, defense counsel presented evidence of McDowell's tragic and traumatic childhood. Gillingham was prepared to offer additional mitigation evidence in the form of testimony of family

members, but McDowell objected. After the testimony of an uncle, Gillingham presented no further mitigation evidence.

During closing argument, the prosecutor asserted that the jury could consider as an aggravating factor the absence of evidence of extreme mental or emotional disturbance or mental impairment.

During the third day of deliberations, the jury asked the trial court to provide direction on whether various events and conditions in McDowell's personal history could be considered as mitigating evidence. The trial court instructed the jury to reread the jury instructions listing aggravating and mitigating factors, and reread one of the instructions. The jury deliberated further and returned a death verdict.

The California Supreme Court affirmed McDowell's conviction and sentence. The United States Supreme Court denied his certiorari petition. The California Supreme Court denied McDowell's habeas corpus petition; the United States Supreme Court denied his second certiorari petition.

On federal habeas corpus, the district court granted McDowell leave to file a second state petition to exhaust his claim of ineffective assistance of trial counsel. The California Supreme Court denied the petition. The district court denied McDowell's amended habeas petition, but granted a certificate of probable cause. McDowell appealed.

[1] McDowell had to establish that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. He had to overcome a strong presumption the counsel rendered adequate assistance and exercised reasonable professional judgment in making decisions. [2] McDowell also had to establish that prejudice resulted by demonstrating that but for counsel's unprofessional errors, the result would have been different. A reason-

able probability is one sufficient to undermine confidence in the outcome.

[3] Gillingham's investigation into McDowell's alleged intoxication was not constitutionally deficient. [4] McDowell did not demonstrate that Gillingham rendered ineffective assistance by failing to have the samples tested earlier, or that any delay in testing them affected the validity of the tests.

[5] Even if it were assumed that Gillingham's performance was deficient, McDowell did not establish that prejudice resulted. Even if the test results were obtained that indicated McDowell was under the influence of alcohol and controlled substances at the time of the murder, there was ample credible evidence that would have contradicted such tests, and established that McDowell was not so intoxicated that he could not have formed the intent to kill.

[6] The evidence of guilt was overwhelming. Gillingham chose to concede McDowell's guilt of felony murder, but to contest whether he had the intent to kill. The choice of this line of defense appeared to have been the best choice from a poor lot. [7] Gillingham's performance was not deficient.

[8] By referring the jury to the original instructions and rereading an instruction, the state trial court accurately informed the jury of the applicable law and adequately responded to the jury's question. [9] To obtain federal habeas relief, McDowell had to demonstrate that any inadequacy in the instructions violated his federal constitutional rights.

[10] McDowell had a constitutional right to have the jury consider any mitigating evidence he presented. [11] But the inquiry was not whether the jury was confused when they wrote the question, but whether the trial court dispelled any confusion. [12] The original jury instructions correctly instructed the jury to consider all the mitigating evidence. [13] The trial court referred the jury to the instructions. This was

directly responsive to the jury's question and correctly told the jury that they could consider as mitigating evidence anything in McDowell's background. [14] This was sufficient to dispel any confusion they might have had.

[15] For penalty phase claims, McDowell had to establish that absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. [16] Gillingham's decision not to call mental health experts was clearly strategic. [17] Even if it were assumed that Gillingham's performance was deficient, McDowell did not demonstrate prejudice. [18] When the aggravating circumstances are overwhelming, it is particularly difficult to show prejudice at sentencing due to alleged failure to present mitigation evidence. There is also a risk associated with presenting a defense based on mental incapacity, and expert testimony is not a panacea for damaging aggravating evidence. [19] McDowell did not show prejudice.

[20] Gillingham did not present further mitigating evidence because he was forced to balance his obligations as an advocate with his client's strongly held views as to the manner in which to present the defense. Even in light of McDowell's objections, Gillingham presented substantial mitigating evidence of physical abuse. Gillingham could not be faulted for failing to present further mitigating evidence. [21] Even if it were assumed that Gillingham's performance was deficient, McDowell did not demonstrate prejudice. The jury chose a sentence of death after hearing evidence of McDowell's tragic childhood and severe physical abuse.

[22] Gillingham's choice not to specifically relate the evidence to the statutory factors was clearly strategic. He spoke to the jury in lay terms and pleaded for mercy. [23] Faulting Gillingham for failing to link the mitigating evidence to the specific statutory factors would probably have narrowed the boundaries of acceptable argument style too much. Gillingham was not constitutionally required to tell the jury that they

could consider the mitigating evidence. The trial court told them in its instructions.

[24] The prosecutor properly could have argued that there was no evidence of mental impairment or intoxication and that the jury could consider this lack of evidence. However, the prosecutor could not argue that this lack of evidence constituted an aggravating factor. [25] Nevertheless, the California Supreme Court determined that any error was harmless. Both Gillingham and the trial court guarded against a reasonable possibility that the argument affected the verdict.

[26] A sentencer may rely on criminal conduct not resulting in a conviction if it has some minimal indicium of reliability beyond mere allegation. [27] The evidence of the child molestation was sufficiently reliable. McDowell was actually convicted by his plea to that conduct. With regard to the rape, McDowell escaped arrest by fleeing and confirmed that he was wanted for rape at the time of his arrest for murder. [28] McDowell's counsel cross-examined the witnesses to test the reliability of their testimony. [29] The trial court instructed the jury that they had to find beyond a reasonable doubt that McDowell committed the crimes.

[30] Although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial. McDowell did not show that the cumulative effect of any alleged errors deprived him of due process.

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## COUNSEL

Andrea G. Asaro, Rosen, Bien & Asaro, San Francisco, California, for the petitioner-appellant.

Robert F. Katz, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

## ORDER

The opinion filed February 26, 1997 and published at 107 F.3d 1351 is amended by deleting Judge Trott as concurring in the majority opinion, and by adding to the majority opinion Judge Trott's concurring and dissenting opinion filed herewith.

With this amendment, Judges Wiggins and Thompson have voted to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc, and Judge Wiggins recommends rejection. Judge Trott has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The suggestion for rehearing en banc is being circulated to the entire court. An order accepting or rejecting that suggestion will be entered in due course.

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## OPINION

THOMPSON, Circuit Judge:

In 1984, a jury in California found Charles E. McDowell, Jr., guilty of murder, attempted murder, attempted rape, and burglary. The jury found true the special circumstances of felony murder/burglary and felony murder/rape. McDowell was sentenced to death.

After exhausting his claims for relief in state court, McDowell filed his first amended petition for federal habeas relief in the district court. This is an appeal from the denial of that petition. In the petition, McDowell argues he received ineffective assistance of counsel during the guilt phase of his trial and asserts several errors occurred during the penalty phase. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

## FACTS

On May 20, 1982, Paula Rodriguez was working as a house cleaner at the Bardsley residence. At that time, McDowell was living with his companion, Lea D'Crenza, in the same neighborhood. At approximately 1:00 p.m., neighbors heard screams coming from the Bardsley residence. Theodore and Dolores Sum telephoned the Bardsleys. They heard more screams through the telephone and then it was disconnected.

The Sums went to the Bardsley home to investigate. Theodore Sum opened the front door and saw a nude man whom he identified at trial as McDowell. McDowell rushed at Theodore Sum and slashed his neck with a knife. The Sums returned to their home and telephoned the police. McDowell was later seen running from the Bardsley home, into the D'Crenza home, and then, later, walking away from the D'Crenza home.

Police officers immediately arrived at the Bardsley home and found Rodriguez stabbed to death in the den. She had been cut twice on the neck; stabbed twice in the chest, once in the abdomen, and once in the left arm; and had deep knife wounds on her hands. She was lying in a supine position with her skirt pulled up, her legs apart, her underwear cut, her blouse slashed, and her body covered with blood. Seminal fluid was found on her underwear. Police officers found her two-year old daughter unharmed upstairs.

Police Officer Henry Petroski followed a trail of blood from the front door of the Bardsley home onto the sidewalk. The trail of blood led to the D'Crenza home. Officer Petroski entered the D'Crenza home and followed the trail of blood through the home. A bloodstained knife was lying on the floor in the kitchen. Officer Petroski followed the trail outside the home to a house approximately 850 feet away from the D'Crenza home.

From the bushes, Officer Petroski heard a male voice say, "Don't shoot me. Don't shoot me. I give up." Officers pulled McDowell from the bushes and arrested him. McDowell's wrist and a finger were cut. He was transported to a hospital for medical treatment.

En route to the hospital and during his stay at the hospital, McDowell made several damaging statements. For example, McDowell stated that he had watched a movie the night before which involved the rape, strangulation, and stabbing of a woman. He stated that he "felt a force" come over him and the movie made him decide to go to the Bardsley home and "hurt" Rodriguez. He further stated that the blood on his clothing belonged to Rodriguez.

McDowell was charged with murder, attempted murder, attempted rape, and burglary, in violation of California Penal Code Sections 187, 261, 459, and 664. Two special circumstances were alleged: felony murder/burglary, under California Penal Code Section 190.2(a)(17)(vii), and felony murder/rape, under California Penal Code Section 190.2(a)(17)(iii).

During the guilt phase of his trial, McDowell conceded guilt to the murder, rape, and burglary. He argued, however, that he did not have the intent to kill Rodriguez and, therefore, was not guilty of the special circumstances. After two days of deliberation, the jury found McDowell guilty on all counts and found true the special circumstances.

During the penalty phase, the prosecution presented evidence of two prior crimes committed by McDowell: a conviction for lewd and lascivious conduct, involving Curtis M.; and an uncharged rape, involving Patricia H.

In mitigation, McDowell's counsel presented family members and a former neighbor who testified about McDowell's tragic childhood, a nurse who was his primary therapist when he was incarcerated in a Mentally Disordered Sex Offender

program, and a probation officer who supervised McDowell after the Curtis M. offense. After two-and-one-half days of deliberation, the jury returned a verdict of death. The state trial court imposed the death sentence.

The California Supreme Court affirmed the conviction and sentence. *People v. McDowell*, 763 P.2d 1269 (Cal. 1988). The United States Supreme Court denied McDowell's petition for certiorari. *McDowell v. California*, 490 U.S. 1059 (1989). In September 1989, the California Supreme Court denied McDowell's first state habeas corpus petition by a postcard denial. In March 1990, the United States Supreme Court denied McDowell's second petition for certiorari. *McDowell v. California*, 494 U.S. 1039 (1990).

In December 1990, McDowell filed his first federal habeas corpus petition with the district court. In October 1991, the district court granted McDowell leave to file a second state petition to exhaust his ineffective assistance of counsel claims. By a postcard denial, the California Supreme Court denied the petition in July 1992. McDowell filed his amended petition in the district court in May 1993.

The district court denied McDowell's petition in November 1995, but granted McDowell a certificate of probable cause. This appeal followed.[1]

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[1]We do not apply in this appeal the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("the Act"). We have held that Chapter 153 of the Act does "not apply to cases filed in the federal courts of this Circuit prior to the Act's effective date of April 24, 1996." *Jeffries v. Wood*, 1996 WL 730493, at *1 (9th Cir. Dec. 20, 1996). The State concedes that in this case Chapter 154 is inapplicable. Moreover, because nothing in the Act benefits McDowell, and we affirm the denial of McDowell's habeas petition without reference to the Act, there is no point in considering it in this case.

## DISCUSSION

### A. General Standards of Review

To warrant federal habeas corpus relief, McDowell, a state prisoner, must establish that his conviction or sentence violates the federal Constitution, a federal statute, or treaty. *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 718 (1996). We review de novo the district court's denial of his habeas corpus petition. *Weygandt v. Ducharme*, 774 F.2d 1491, 1493 (9th Cir. 1985). We review for clear error any factual findings made by the district court; the state court's factual findings are entitled to a presumption of correctness. *Bonin*, 59 F.3d at 823; 28 U.S.C. § 2254(d); *Melugin v. Hames*, 38 F.3d 1478, 1482 (9th Cir. 1994).

### B. Ineffective Assistance of Counsel – Guilt Phase

McDowell argues his counsel, Howard Gillingham, rendered ineffective assistance during the guilt phase of his trial because (1) Gillingham failed to adequately investigate and to present a defense based on McDowell's alleged intoxication at the time of the murder; and (2) during closing argument, Gillingham conceded McDowell's guilt of felony murder, and then did not effectively argue why McDowell lacked the intent to kill, which lack of intent would have rendered him not guilty of the special circumstance required for a sentence of death in a felony murder conviction.

Because a claim of ineffective assistance of counsel raises a mixed question of law and fact, we review the claim de novo. *Harris v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995). We review de novo whether counsel's performance was deficient and whether prejudice resulted from any deficient performance. *Thompson v. Calderon*, 86 F.3d 1509, 1515 (9th Cir. 1996); *see also Strickland v. Washington*, 466 U.S. 668, 698 (1984) (concluding state court's determination that coun-

sel's performance was not deficient is not a finding of fact entitled to a presumption of correctness).

[1] McDowell first must establish that his " 'counsel's representation fell below an objective standard of reasonableness . . . considering all the circumstances . . . under prevailing professional norms.' " *Harris*, 64 F.3d at 1435 (quoting *Strickland*, 466 U.S. at 688). McDowell must overcome a "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making decisions." *Thompson*, 86 F.3d at 1515 (internal quotations and citation omitted).

[2] McDowell also must establish prejudice resulted from any deficient performance. *Id.* He must demonstrate " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 694).

1. Intoxication Defense

McDowell asserts Gillingham's performance was deficient because he failed to timely investigate whether McDowell was under the influence of alcohol or various controlled substances at the time of the murder. McDowell complains that Gillingham did not obtain timely testing of his blood and urine samples, taken on the day of his arrest. He argues that, had Gillingham presented evidence of his alleged intoxication[2] at the time of the murder, the jury would have found he did not have the intent to kill which, at that time, was an element of the felony murder special circumstances. *See Carlos v.*

[2]In this opinion, "intoxication" refers to being under the influence of alcohol and/or controlled substances.

*Superior Court*, 672 P.2d 862, 865 (Cal. 1983), *overruled by People v. Anderson*, 742 P.2d 1306 (Cal. 1987).

McDowell contends Gillingham had the following information which should have prompted a thorough and timely investigation into McDowell's alleged intoxicated state at the time of the murder: Approximately a year after his arrest, in March 1983, McDowell told Marilyn Butler, a law clerk helping Gillingham, that, on the morning of the murder, he had consumed alcohol and various controlled substances. McDowell also told experts retained by Gillingham that he had consumed excessive alcohol and controlled substances on the morning of the murder. In addition, Speare Primpas, a friend of McDowell, and D'Crenza both told Gillingham that McDowell used drugs extensively.

[3] Gillingham's investigation into McDowell's alleged intoxication was not constitutionally deficient. Gillingham requested the testing of the samples a month after McDowell told Butler he had consumed alcohol and controlled substances on the morning of the murder. The police department's report, dated May 20, 1983, stated controlled substances were not detected and McDowell's blood alcohol level was .011 at the time his blood sample was taken.[3]

Gillingham then independently had the samples tested. A report from the Institute of Forensic Sciences, dated July 5, 1983, reported no cannabinoids, ethanol, narcotics, or stimulants were detected. A report from the Center for Human Toxicology, dated October 5, 1983, reported that no LSD was detected and only a trace of THC. A note from Gillingham indicates that the THC testing indicated the marijuana was ingested days rather than hours before the samples were

[3]The sample was taken approximately seven hours after the murder. Experts for McDowell and the State agreed the average burn-off rate would be .02 per hour. Using this burn-off rate, McDowell's blood alcohol level at the time of the murder would have been approximately .151.

taken. In these circumstances, Gillingham's failure to pursue further testing of the samples was not constitutionally deficient.

[4] McDowell also has not demonstrated that Gillingham rendered ineffective assistance by failing to have the samples tested earlier. McDowell has not shown that any delay in testing the samples affected the validity of the tests. The facilities that actually did the independent testing for Gillingham did not indicate that the results might be inaccurate due to a delay in testing. The State contradicted McDowell's expert testimony, presented during the evidentiary hearing before the district court, that the alcohol in the blood sample could have dissipated over time. The State's expert testified that the test samples would have remained stable while in storage at the police department.

[5] Even if we were to assume Gillingham's performance was deficient, McDowell has not established that prejudice resulted from Gillingham's alleged failure to adequately investigate or to present an intoxication defense. Even if test results were obtained that indicated McDowell was under the influence of alcohol and controlled substances at the time of the murder, there was ample credible evidence which would have contradicted such tests and established that McDowell was not so intoxicated that he could not have formed the intent to kill.

A news crew videotaped McDowell's arrest. On the videotape, McDowell yells, "I'm wanted for rape in Florida. You can have all you want." After viewing the videotape, the district court found that McDowell was portrayed "in a state not resembling intoxication." This finding is not clearly erroneous. On the videotape, McDowell does not appear intoxicated. Further, after Gillingham and his experts viewed the videotape, they also came to the conclusion that McDowell did not appear intoxicated. Had an intoxication defense been pres-

ented, the jury would have viewed the videotape and likely would have reached the same conclusion.

In addition, Officer Petroski, an arresting officer, stated McDowell was not "under the influence of anything" at the time of his arrest. In his report, Officer Michel, an officer who transported McDowell to the hospital after his arrest, described McDowell's behavior in detail but did not suggest or mention that McDowell was intoxicated. Glenn Smith, a paramedic who treated and transported McDowell after his arrest, testified that he was trained to recognize when people are under the influence of intoxicants, but he did not notice any symptoms that McDowell was under the influence of alcohol or controlled substances. Also, the hospital records indicate McDowell was conscious, alert, and coherent and do not indicate that McDowell was intoxicated at the time of his arrest.

In sum, Gillingham did not render ineffective assistance by failing to earlier test the samples or to further pursue an intoxication defense. Even if the samples might have indicated some degree of intoxication, there was substantial credible evidence that McDowell's behavior was not affected. McDowell suffered no prejudice.

2. Closing Argument

McDowell argues Gillingham rendered ineffective assistance during closing argument by conceding his guilt of felony murder. McDowell also contends he received ineffective assistance because, during closing argument, Gillingham argued that McDowell lacked the intent to kill which was an element of the special circumstances, but did not explain how the evidence related to this lack of intent. Gillingham's performance in this regard was not constitutionally deficient.

[6] The evidence of McDowell's guilt of felony murder was overwhelming. Gillingham chose to concede McDowell's

guilt of felony murder but to contest whether McDowell had the intent to kill. If McDowell did not have the intent to kill, he would not have been eligible for the death sentence. The choice of this line of defense appears to have been the best choice from a poor lot. *See Hendricks v. Calderon*, 70 F.3d 1032, 1042 (9th Cir. 1995) ("The choice to pursue a bad strategy makes no comment on an attorney's judgment where no better choice exists."), *cert. denied*, 116 S. Ct. 1335 (1996).

[7] We also reject McDowell's argument that Gillingham failed to present a viable argument for the jury to find McDowell did not possess the intent to kill. Gillingham argued that McDowell went to the residence with only the intent to rape Rodriguez rather than to kill her and he brought the knife with him only to threaten her. He argued that McDowell's conduct was inconsistent with a plan to kill.[4] Gillingham's performance was not deficient.

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[4]For example, McDowell's counsel argued:

> May 20th, mid afternoon, clad in shorts only, no automobile available for pre-planned escape, no disguise or calculated change of appearance.
>
> . . .
>
> He went over there to kill her, and he took the cigarettes, he took the lighter? I don't think so. I don't think so.
>
> . . .
>
> Let's focus on Mr. McDowell's actions after. Are they consistent with anything other than confusion and frenzy? Are there signs of calculation and plan? The open door as he returns to D'Crenza's leaving it open.
>
> The knife tossed on the floor apparently or dropped right in plain sight in the kitchen.
>
> The shorts draped over the faucet in the bathroom. The towel thrown on the floor. It's in evidence also.
>
> The tape that was grabbed with the bloody hand. Still shirtless, he leaves.
>
> The actions of something or someone involved in something that went wrong. A trail of blood and evidence leading to his arrest; and on that trail is he running? Is he sneaking?

C. Supplemental Instructions

[8] McDowell next argues the state trial court erred by failing to give supplemental instructions, in response to a question from the jury during deliberations in the penalty phase. He asserts this error prohibited the jury from considering the mitigating evidence he presented. We conclude that, by referring the jury to the original jury instructions and by rereading an instruction, the state trial court accurately informed the jury of the applicable law and adequately responded to the jury's question.

During the third day of deliberations in the penalty phase, the jury sent the court a note which stated:

> We, the jury in the above entitled action, request the following:
>
> Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.
>
> 2. Love/hate relationship with father/mother.
>
> 3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.
>
> 4. Religious extremes confused defendant.
>
> 5. Confusing sexual mores at home (incest), with mother condoning or aware of incest/abuse.

6. Accused of death of favorite sister.

7. Stress of divorce from family.

8. Rejection of mother's love during teen years.

Thank you.

In a hearing outside the presence of the jury, the state trial court stated:

> I feel I cannot say anything in light of the sentence which indicates which way they are voting, and anything I say at this particular time will be coercive.
>
> . . .
>
> They are asking me to interpret the evidence; something I cannot do.

Counsel for McDowell's position was, "in my judgment the question could be answered: that the mitigating — or the circumstances, the circumstances named, are proper circumstances."

The state trial court responded to the jury's question:

> You're asking me, in essence, to decide the case for you. You have been instructed as to the law and I hate to throw you out like this.
>
> But if you go back and read the instructions, in particular you have one instruction in which the mitigating and aggravating factors are listed.
>
> Then you have another instruction, the concluding instruction which reads as follows:

> "One mitigating circumstance may outweigh several aggravating circumstances or one aggravating circumstance may outweigh several mitigating circumstances. You shall give each the weight to which you find it to be entitled."
>
> Those are the two instructions that I think really apply. I would ask you to go back, reread those instructions . . . .

The jury resumed deliberations on Friday afternoon and, after a weekend break, returned a verdict of death.

The jury's question can be interpreted to mean that, at the time the jury wrote it, eleven jurors were confused and mistakenly thought they could not consider the eight instances of McDowell's background as mitigating evidence. This confusion, McDowell argues, was not dispelled by the state trial court's response, and as a result he was denied a fair trial and is entitled to federal habeas relief.

[9] To obtain federal habeas relief, McDowell must demonstrate that any inadequacy in the instructions violated his federal constitutional rights. *Thompson*, 86 F.3d at 1521 (stating "Giving an instruction inadequate by direct appeal standards does not necessarily result in habeas relief from a state court conviction."); *see also Duckett v. Godinez*, 67 F.3d 734, 744 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1549 (1996).

[10] McDowell clearly has a constitutional right to have the jury consider any mitigating evidence he presents. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Although the jury determines the appropriate weight to be given to the mitigating evidence, the jury "may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15.

[11] Our inquiry, however, is not whether the jury was confused at the time they wrote the question, but whether the

state trial court adequately responded to their inquiry and dispelled any confusion they might have had. When a jury expresses confusion, the state trial court must respond with "sufficient specificity to clarify the jury's problem." *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir.) (citing *Bollenbach v. United States*, 326 U.S. 607 (1946)), *cert. denied*, 459 U.S. 975 (1982). The state trial court must clear away with "concrete accuracy" the jury's misunderstanding that it cannot consider the mitigating evidence. *See Bollenbach*, 326 U.S. at 612-13.

[12] The state trial court's original instructions correctly instructed the jury that they could consider all the mitigating evidence presented by McDowell. In the original instructions, the state trial court listed the aggravating and mitigating factors under California Penal Code Section 190.3 and stated the jury "shall" consider those factors. One of the factors was:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death.

[13] The state trial court referred the jury to this instruction in response to the jury's question, and instructed the jury to read it. This instruction was directly responsive to the jury's question and correctly told the jury that they could consider as mitigating evidence anything in McDowell's background.

McDowell argues this was not good enough. He contends the state trial court should have given the jury supplemental instructions, instructions framed in some different language which would have informed the jury that each of the eight factors listed in the jury's question could be considered as a mitigating circumstance and that each factor should be given whatever weight the jury deemed appropriate.

The state trial court could have elaborated and answered the jury's question in this fashion, but the Constitution does not require the court to give the best available answer. We have approved a practice of referring the jury to the original instructions when those instructions correctly answer the jury's question. *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 446 U.S. 923 (1980). We cannot assume the jury remained confused after the state trial court specifically told them to read the particular original instruction which told them in no uncertain terms that they could consider any evidence of McDowell's background as mitigating evidence.[5]

[14] The state trial court's response to the jury's question was sufficient to dispel any confusion they might have had.

D. Ineffective Assistance of Counsel – Penalty Phase

McDowell argues Gillingham rendered ineffective assistance at the penalty phase because Gillingham (1) failed to call a mental health expert as a witness; (2) failed to present mitigating evidence of McDowell's sexual abuse as a child and his chronic substance and alcohol abuse; and (3) during closing argument, Gillingham failed to adequately argue the mitigating effect of McDowell's background. These arguments lack merit.

[15] McDowell must demonstrate that Gillingham's representation was constitutionally deficient and that prejudice resulted. *Strickland*, 466 U.S. at 688. For penalty phase

[5]Juror Connie Jackson Kimble, the holdout juror, has submitted a declaration in which she states that the state trial court's response did not "help us in resolving our dispute" and that another juror told her that the factors she was focusing on "were not relevant and that they were inconsistent with the instructions." This evidence is not admissible to impeach the verdict. Fed. R. Evid. 606(b); *Hard v. Burlington N.R.R. Co.*, 870 F.2d 1454, 1460 (9th Cir. 1989); *Walker v. United States*, 298 F.2d 217, 226 (9th Cir. 1962).

claims, the prejudice prong requires McDowell to establish that, absent the errors, "the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695; *see also Hendricks*, 70 F.3d at 1036-37.

1. Mental Health Expert

Gillingham retained three mental health experts: Doctor Vicary, a forensic psychiatrist; Doctor Maloney, a clinical psychologist; and Doctor Murphy, a psychologist with an expertise in homosexuality. Doctor Murphy interviewed McDowell on two occasions and prepared a report which revealed extremely damaging information about McDowell. The report revealed an obsession with rape and violence against women, "masochistic overtones to his homosexual activity," and a lack of remorse or acceptance of responsibility for his behavior. For example, in the report Dr. Murphy stated:

> When asked about obsessive thoughts, he mentioned he was always obsessed with having sex with young boys. . . . Another obsession related to rape of women. . . . His most prominent sexual fantasy is as follows:
>
> > He finds a woman and brings her to a house he has built. The house has a labyrinth of dungeons, in which there are five dungeons one being enclosed in another. He places his female victims in the dungeons progressively and when he reaches the last dungeon, he not only rapes the woman, but then either slits her throat or strangles her to death.
>
> He indicated he saw himself as the "lowest scum on earth" then a few minutes later was berating inmates

> who thought they were so good and said he was as "good as any of them."
>
> . . .
>
> [McDowell] is fascinated by WW II and wishes he had lived in that period. He is particularly interested in the Nazi concentration camps and the sadistic treatment of prisoners.
>
> . . .
>
> He opined that he may have gotten drunk and thought about the [Rodriguez] murder as a punishment for [his lover's] lack of recognition [of his work] and the argument between them.
>
> . . .
>
> When asked about his previous incarcerations and institutionalizations, he indicated he was able to manipulate mental health practitioners to think what he wanted.
>
> . . .
>
> He reported uncontrollable rages when married that were usually caused by alcohol intoxication. He stated his wife had him arrested and at the same time a broad smile came across his face.

Doctor Murphy distributed his report to Gillingham, Doctor Maloney, and Doctor Vicary. During the evidentiary hearing before the district court, Gillingham testified that he met with Doctor Vicary during the guilt phase of the trial and, at that time, recalled that Doctor Vicary had received a copy of Doctor Murphy's report. Gillingham then decided not to call Doc-

tor Vicary or any other mental health expert during the penalty phase and did not retain another mental health expert.

[16] Gillingham's decision not to call Doctor Vicary as an expert or to call another mental health expert clearly was a strategic decision. Had Gillingham called Doctor Vicary, the prosecution likely would have elicited the extremely damaging information in the Murphy report. If Gillingham retained another expert, it would have been difficult not to reveal the information within the Murphy report to the new expert. If Gillingham did not provide the Murphy report to a newly retained expert, the new expert would have been compelled to testify that he or she did not receive all the reports and there was a missing report. Further, if Gillingham called an expert witness, the prosecution certainly would have called its own expert and no doubt would have requested an examination of McDowell by its expert.

There was also a reasonable likelihood that a new expert would obtain comparable or other damaging information from interviewing McDowell. Indeed, Doctor Maloney's report also is very damaging. In his report, Doctor Maloney states: "adults with [McDowell's] profile may report behavior characterized by poorly socialized aggression, authority conflicts, unexpected violent outbursts and . . . the extreme by such acts as unprovoked bar knifings, 'Manson type' killings and bizarre sado-masochistic sexuality."

Moreover, to date, no expert has opined that McDowell suffers from a mental impairment which likely would elicit sympathy from the jury in light of the overwhelming aggravating evidence. In his report, Doctor Maloney states:

> It appears that his father was abusive, but it also appears that [McDowell] may attribute a number of problems to his father that are only tenuously connected.

. . .

[H]is mental status is essentially normal.

. . .

His overall pattern of performance is not suggestive of an individual who has any significant emotional disturbance, such as a functional psychosis or organic brain syndrome.

. . .

There is some suggestion that he may have been exaggerating his psychological problems.

. . .

Most persons with similar profiles are considered to straddle the fence between a personality disorder and psychosis.

. . .

Present data do suggest that Mr. McDowell has a serious emotional disturbance. It does not appear to be a psychotic-like disturbance, in the sense that his thinking processes are generally intact and there is no suggestion of any obvious disruption in his ability to perceive reality.

[17] We conclude Gillingham did not render deficient assistance by choosing not to call an expert witness. However, even if we were to assume Gillingham's performance was deficient, McDowell has not demonstrated prejudice.

McDowell argues that Gillingham should have called Doctor Vicary as an expert witness because he would have "tied

up" the mitigating evidence and would have explained to the jury how McDowell's violent conduct was caused by his sexual abuse as a minor. In a declaration submitted in support of McDowell's habeas petition, Doctor Vicary states he would have testified as follows:

> I had formed the opinion generally that Mr. McDowell's personal background was literally traumatic, and had left him clinically psychologically disturbed.
>
> . . .
>
> I would also have sought to tie together all of the evidence . . . obtained . . . in an effort to explain Mr. McDowell's personal history and mental condition to the jury. Thus I would have sought to explain to the jury the relationship, psychologically and behaviorally, between Mr. McDowell's personal background and his criminal acts — what it is that makes the various aspects of Mr. McDowell's tragic and abusive personal history mitigating circumstances. In this regard I would have explained to the jury that the nature of his criminal conduct is consistent with and explained by his personal history of enduring and witnessing physical and sexual abuse, and by his chronic and acute substance abuse.

[18] This evidence is far from compelling. Indeed, it offers little to combat the overwhelming aggravating circumstances. "[W]here the aggravating circumstances are overwhelming, it is particularly difficult to show prejudice at sentencing due to the alleged failure to present mitigation evidence." *Bonin*, 59 F.3d at 836. Further, there is a negative risk associated with presenting a defense based on mental incapacity, and expert testimony is not a panacea for damaging aggravating evidence. *See id.* at 834-35.

[19] McDowell has not shown prejudice. He has not demonstrated a reasonable probability that the introduction of

Doctor Vicary's proposed testimony or other expert testimony would have changed the jury's sentencing decision. *See id.* at 836.

2. Mitigating Evidence Not Introduced

McDowell next contends Gillingham rendered ineffective assistance by not presenting available mitigating evidence relating to his background.

McDowell's defense during the penalty phase focused on his father's physical and psychological abuse of him throughout his childhood. McDowell presented evidence that he suffered severe beatings, on a daily basis, from the time he was only weeks old. His maternal uncles testified that McDowell's father beat him severely on a daily basis. His brother also testified that his father beat McDowell severely, including beating him with a two-by-four. A former neighbor testified that McDowell's father severely beat McDowell and his brother and that she witnessed McDowell's frequent bruises. Finally, his mother testified that McDowell's father beat him daily, starting when he was three weeks old, and blamed him for the death of his sister. She testified that on one occasion his father held him over a fire and beat him to the point of needing an operation. She testified she was not close to McDowell because of her belief that he was a homosexual.

Although Gillingham presented the foregoing evidence of physical abuse, he did not present evidence of the sexual abuse McDowell suffered from his uncle and other relatives or of his history of substance and alcohol abuse. The district court determined that, by failing to present such evidence, Gillingham's performance was not deficient. We agree.

As correctly found by the district court, Gillingham expended considerable effort in investigating McDowell's background and was prepared to present further mitigating evidence. However, as found by the district court, a conflict

over strategy during the penalty phase arose between McDowell and his lawyer, Gillingham.

After the state trial court continued the penalty phase over the weekend to allow Gillingham to confer with McDowell and his family members, Gillingham told the court that disagreement continued between him and McDowell. McDowell told the state trial court:

> There are witnesses that we have that I have no discrepancies about, but there are some I would rather he not bring on for the fact that it will bring — or open old wounds that are not necessary to be opened regardless to what the consequences of myself is.
>
> I don't feel that these witnesses can help me. They can only hurt myself and my family. And these witnesses, I might add, are a part of my family.
>
> There are two witnesses I don't mind bringing in and questioning and whatever, but the rest of them, as far as my family is concerned, I would rather they not be brought in.

After the testimony of the first defense witness, Marshall Brakefield, a maternal uncle, Gillingham explained at a sidebar conference that McDowell asked to be excused and "He was opposed to all of this. I have just asked him if he could deal with it at least up until his mother. He thinks he can." The next morning, Gillingham informed the court that the bailiff had discussed shackling McDowell due to his agitation.

[20] As found by the district court, Gillingham did not present further mitigating evidence because he "was forced to balance his obligations as an advocate with his client's strongly held views as to the manner in which to present the defense." Even in light of McDowell's objections, Gillingham

was successful in presenting a substantial amount of mitigating evidence of physical abuse. Gillingham cannot be faulted for failing to present further mitigating evidence, much of which would have been cumulative.

[21] However, even if we were to assume Gillingham's performance was deficient because he failed to introduce additional evidence of abuse, including sexual abuse and substance abuse, McDowell has not demonstrated prejudice. The jury chose a sentence of death after hearing evidence of McDowell's tragic childhood and the severe physical abuse he suffered. In light of this mitigating evidence and the overwhelming aggravating circumstances, McDowell has not demonstrated a reasonable probability that had Gillingham introduced more evidence of abuse, McDowell's sexual abuse and substance abuse, the jury would have chosen a different sentence. *See id.*

3. Closing Argument

McDowell contends Gillingham rendered ineffective assistance during his closing argument in the penalty phase. McDowell argues Gillingham's closing argument was ineffective because he did not specifically state that the catch-all factor of California Penal Code Section 190.3(k) allowed the jury to consider any evidence of McDowell's background as mitigating circumstances.[6]

[22] Gillingham's choice not to specifically relate the evidence to the statutory factors was clearly a strategic choice. In his closing argument, Gillingham was not formalistic and did not use a mathematical approach in arguing how the jury should analyze and balance the aggravating factors and miti-

[6]As instructed by the state trial court, this statutory catch-all factor provided that the jury could consider in mitigation any evidence of McDowell's "character or personal history" which "extenuates the gravity of the crime." *See* Cal. Pen. Code 190.3(k).

gating circumstances. Instead, he spoke to the jury in laypersons' terms and pleaded mercy for McDowell. Gillingham reminded the jury of the magnitude of their decision and asked the jury not to be vengeful by substituting one death for another. He explained that he was amazed that the victim's husband could come to court and testify without rage, hate, or anger and impliedly asked the same from the jurors. He also gave statistics on the death penalty and argued that the killing of one person "does not necessarily stop killing by another person." Finally, he referred to McDowell's abusive childhood background and asserted that "McDowell is like cast from a mold, or having lived in a vice, and the clamp marks are there and they were created basically in the image and likeness of his father."

[23] Faulting Gillingham for failing to link the mitigating evidence to specific statutory factors "would probably narrow the boundaries of acceptable argument style too much." *Hendricks*, 70 F.3d at 1045. Gillingham was not constitutionally required to specifically tell the jury they could consider the mitigating evidence under section 190.3(k). The trial court told them this in its instructions. *See supra*.

E. Prosecutorial Misconduct

McDowell argues the prosecutor committed prosecutorial misconduct by (1) arguing that the absence of particular mitigating circumstances constituted aggravating factors, (2) arguing that the presence of Rodriguez's two-year old child in the house at the time of the murder constituted an aggravating factor, (3) commenting on McDowell's demeanor during trial, and (4) eliciting inadmissible testimony. We reject these arguments.

1. Absence of Mitigating Circumstances

During closing arguments in the penalty phase, the prosecutor argued that the jury could consider the absence of evi-

dence applicable to mitigating factors (d) and (h) under California Penal Code Section 190.3 as evidence of aggravation. Factor (d) provides that, in reaching its sentencing decision, the jury may consider: "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Factor (h) provides that the jury may consider: "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication."

During closing argument, the prosecutor made the following statements:

> Another category or factor that you can consider and then give the appropriate weight to is . . . "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."
>
> I submit to you that there is absolutely no evidence Mr. McDowell was under the influence of extreme mental or emotional disturbance.
>
> It is People's contention that the fact that there was no influence of a strain, mental or emotional disturbance, is a factor in aggravation, and you should give it the proper weight.
>
> . . .
>
> [With respect to factor (h)], [w]ell if Mr. McDowell was able to do it, what he did, . . . with no evidence of intoxication . . . then you know that it didn't exist.
>
> And I submit to you that this is a factor in aggravation because it tells you the degree to which Mr.

> McDowell planned out and foresaw and designed a scheme to meet his sexual urgings on May 20th, 1992.

[24] The prosecutor properly could have argued that there was no evidence of mental impairment or intoxication and the jury could consider this lack of evidence. *Cf. Tuilaepa v. California*, 114 S. Ct. 2630, 2637-39 (1994). The prosecutor could not argue, however, that under California law this lack of evidence constituted a positive aggravating factor. *See People v. Davenport*, 710 P.2d 861 (Cal. 1985).

[25] Nevertheless, in the present case, the California Supreme Court determined any error was harmless. *McDowell*, 763 P.2d at 1281. We agree with the California Supreme Court: there is not a reasonable possibility that the argument affected the verdict. Both Gillingham and the state trial court guarded against this.

During his closing argument, Gillingham told the jury the prosecutor had improperly converted a mitigating factor into an aggravating factor. He also told the jury they could not consider the absence of a mitigating factor as an aggravating factor. Even the prosecutor stressed to the jury that they were not simply to add up the number of aggravating and mitigating factors to determine the appropriate sentence, and the state trial court instructed the jury that they were to give whatever weight to the factors they deemed appropriate and that one mitigating circumstance could outweigh several aggravating circumstances.[7]

---

[7]We assume only for the purpose of this analysis that it could be an error of federal constitutional dimension for the prosecutor to argue that the absence of a mitigating factor can be considered by the jury as an aggravating factor in a capital case. We do not decide this question, however, and express no opinion on it.

2. Presence of Rodriguez's Child

McDowell also asserts the prosecutor improperly argued during his closing argument in the penalty phase that McDowell chose Rodriguez as a victim because her child was present at the Bardsley home at the time of the rape and murder. McDowell contends there was no evidence that he knew Rodriguez had a child or that the child would be present at the time of the rape and murder.

An improper comment made by a prosecutor does not violate a defendant's constitutional rights unless the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Turner v. Marshall*, 63 F.3d 807, 817-18 (9th Cir. 1995) (internal quotations and citation omitted).

The prosecutor's comment did not violate McDowell's due process rights. The comment was a single comment made in the context of other appropriate argument. Moreover, the jury was aware Rodriguez's child was far removed from the scene of the murder and, as asserted by McDowell, there was no evidence McDowell chose his victim because a child was present. It is highly unlikely, particularly in light of the other overwhelming aggravating evidence, that this argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

3. Comments on McDowell's Demeanor and Tactics

McDowell argues that the prosecutor, during his closing argument in the penalty phase, improperly commented on McDowell's demeanor and implied McDowell's mother should not be permitted to plead for his life. The prosecutor likened McDowell to a lion, placid only while caged, and stated that he was well behaved during trial because his fate was being determined. The prosecutor also stated that McDowell had the right to present his mother's plea for his

life, but then stated that McDowell did not allow anyone to plead for Rodriguez's life.

Even if arguably inflammatory, these statements did not render McDowell's sentencing phase fundamentally unfair. By making the lion comment the prosecution merely asked the jury not to rely on McDowell's passive behavior during trial. With regard to the comment pertaining to McDowell's mother, the prosecutor did not state that the jury could not consider the mother's plea. The prosecutor simply asked the jury not to overlook the victim and not to make its sentencing decision based solely on sympathy for McDowell.

4. Inadmissible Testimony

Finally, McDowell argues the prosecutor committed misconduct during the penalty phase by eliciting inadmissible testimony from Patricia H., an earlier rape victim. Patricia H. testified that, on the day of her rape, McDowell asked her for a glass of tea and asked that she wrap a paper towel around the glass. She testified she asked McDowell if he wanted the towel around the glass "so they can't find your fingerprints." The prosecutor then wanted to ask Patricia H. what McDowell's answer was. This prompted a sidebar conference at which the state trial court ruled Patricia H. could not testify, in response to the prosecutor's question "What did Mr. McDowell say?", that McDowell said he had served enough time in prison. The prosecutor explained that he had told Patricia H. she was not to say that.

The prosecutor then asked Patricia H., "What did Mr. McDowell say?" Patricia H. answered "He said, yes, he'd done enough time. He knew all the tricks." The defense objected and the prosecutor explained that he had instructed the witness to testify only that McDowell stated "I know all the tricks."

The district court found that the prosecutor did not commit misconduct. He had instructed Patricia H. not to say that

McDowell had served time in prison, but she ignored or misunderstood the instruction. We agree with the district court. The prosecutor did not commit misconduct.

F. Admission of Conduct Underlying Child Molestation and Patricia H.'s Rape

McDowell argues that the introduction, during the penalty phase, of the facts underlying his prior conviction by guilty plea to lewd and lascivious conduct (as a result of a charge of child molestation) and the unadjudicated rape of Patricia H. rendered his sentence fundamentally unfair. We disagree.

[26] The introduction of this conduct during the penalty phase of a capital case does not necessarily violate a defendant's rights under the Eighth or Fourteenth Amendments or render a death sentence unreliable. *See Williams v. Lynaugh*, 814 F.2d 205, 207-08 (5th Cir.), *cert. denied*, 484 U.S. 935 (1987); *Hatch v. State*, 58 F.3d 1447, 1465-66 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1881 (1996); *Devier v. Zant*, 3 F.3d 1445, 1464-65 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 1125 (1995). A sentencer may rely on criminal conduct not resulting in a conviction if the evidence has "some minimal indicium of reliability beyond mere allegation." *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984); *see also United States v. Hull*, 792 F.2d 941, 942-43 (9th Cir. 1986); *Williams v. New York*, 337 U.S. 241, 247 (1949).

[27] The evidence of the child molestation was sufficiently reliable. As a consequence of the child molestation charge, McDowell was actually convicted of lewd and lascivious conduct by his guilty plea to that offense. With regard to the rape of Patricia H., although McDowell was not convicted of that offense, an arrest warrant had been issued for his arrest on that charge. He had escaped arrest by fleeing the state of Florida where the rape occurred. That he was wanted for rape in Florida was confirmed by McDowell when he stated at the

time of his arrest following the murder: "I'm wanted for rape in Florida." *See supra.*

[28] Further, McDowell's counsel had the opportunity to and did cross-examine the witnesses to test the reliability of their testimony. Curtis M., the victim of the child molestation offense, and his mother testified. To the extent McDowell argues that Curtis M. lied to experts in his deposition that was taken shortly after the molestation, McDowell's counsel had the opportunity to test his credibility during cross-examination. With regard to the rape offense, Patricia H. and her son who was present during her rape also testified.

[29] In addition, the state trial court instructed the jury that, before they could consider the evidence of the child molestation and rape offenses, they had to find beyond a reasonable doubt that McDowell had committed those crimes. *See People v. Balderas*, 711 P.2d 480, 515-16 (Cal. 1985) (concluding prosecution must prove unadjudicated offenses beyond a reasonable doubt). In these circumstances, the introduction of the evidence of the child molestation and rape did not render the sentencing phase constitutionally unfair. *See Williams*, 814 F.2d at 207-08.

G. Extrinsic Evidence

McDowell argues the jury considered extrinsic matters in reaching its penalty decision. The district court rejected this argument because the only evidence submitted in support of it was a declaration which was inadmissible under Federal Rule of Evidence 606(b).

McDowell submitted the declaration of Connie Jackson Kimble, the holdout juror in McDowell's trial. In her declaration, Kimble stated that the other jurors were becoming increasingly impatient and angry with her. She also stated:

> One of the jurors . . . stated that I should vote for death because a sentence of life without parole

> would not mean that Mr. McDowell would not be paroled. The juror stressed that if we imposed a sentence of life without parole it wouldn't mean "without parole" and Mr. McDowell could be paroled in 10 or 15 years. The juror also stated that if I voted for death Mr. McDowell would not be executed, because no one was being executed in California. They stressed that if he were sentenced to death he would just remain in prison the rest of his life.

She then explained that because McDowell had suffered such a "horrible life," she believed he should not be executed; but she did not want him to be released from custody. She stated she voted for the death sentence because she thought that, notwithstanding the jury's verdict of death, McDowell would not be executed.

McDowell first argues that the district court erred by applying Federal Rule of Evidence 606(b) to decide the admissibility of Kimble's declaration. McDowell contends the district court should have applied California Evidence Code Section 1150(a). We disagree.

Federal Rule of Evidence 1101(e) provides that the Federal Rules of Evidence apply to habeas corpus petitions filed in federal court under 28 U.S.C. § 2254. Fed. R. Evid. 1101(e). Other Circuits have applied Rule 606(b), rather than state law, when determining whether evidence is admissible to impeach a state court verdict. *Bibbins v. Dalsheim*, 21 F.3d 13, 16-17 (2d Cir. 1994); *Stockton v. Commonwealth of Va.*, 852 F.2d 740, 743-44 (4th Cir. 1988); *Silagy v. Peters*, 905 F.2d 986, 1008-09 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991); *see also Bloom v. Vasquez*, 840 F. Supp. 1362, 1377 (C.D. Cal. 1993). Consistent with the approach taken by our sister circuits, we conclude the district court properly applied the federal law of Rule 606(b).

We also conclude the district court did not err by refusing to admit juror Kimble's declaration into evidence. Under Rule 606(b),[6] testimony regarding "extraneous influences" on the jury is admissible, but testimony regarding the deliberative process, the "motives of individual jurors and conduct during deliberations" is inadmissible. *United States v. Falsia*, 724 F.2d 1339, 1343 (9th Cir. 1983); *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982). "The type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings and bias that every juror carries into the jury room." *Hard v. Burlington N.R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989).

The Seventh Circuit has concluded that identical proffered testimony regarding the consequences of a life or death sentence was inadmissible under Rule 606(b). *Silagy v. Peters*, 905 F.2d 986, 1008-09 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991). In *Silagy*, the court reasoned that admitting such evidence would authorize "constant attempts to undermine jury verdicts through the scrutiny of the juror's thoughts and deliberations." *Id.* at 1009.

Juror Kimble's declaration reflects her belief about the consequences of the sentence of death and her motive in voting

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[6]Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Fed. R. Evid. 606(b).

for it. The district court did not err by excluding her declaration.

H. Cumulative Effect

Finally, McDowell argues that the cumulative effect of the alleged errors deprived him of due process.

[30] Although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial. *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975); *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983). That is not the case here. McDowell has not shown the cumulative effect of any alleged errors deprived him of due process.

AFFIRMED.

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TROTT, Circuit Judge, Concurring and Dissenting:

I

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Supreme Court held that the constitutional right of trial by jury "qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the states." In so holding, the Court said that trial by jury is "fundamental to the American scheme of justice," *id.* at 149. The Court observed that

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the government. Those who wrote our constitu-

> tions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

*Id.* at 155-156.[1] These observations provide an important backdrop against which McDowell's case must be decided because what is at stake is McDowell's constitutional right to have a jury decide whether he shall live or die.

A jury, however, is not an unguided missile. To fulfill its role, it must be instructed properly as to the relevant law and as to its function in the fact-finding process. It also must fol-

[1]*See also, Carella v. California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring in the judgment)("A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt.").

low these instructions. Otherwise, it too might exercise power in a manner thoroughly arbitrary or eccentric.

On occasion, however, even though the instructions are flawless, a jury becomes confused and untracked. When they do, the risk is that any result reached by them, including a verdict, may not square with the law they are bound to apply. Accordingly, the unremarkable rule is that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). As the Seventh Circuit has said, *Bollenbach* places on the trial judge "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem." *Davis v. Greer*, 675 F.2d 141, 145 (1982). This duty exists among other reasons because " '[i]n a trial by jury . . . , the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' " *Bollenbach*, 326 U.S. at 612 (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933). Moreover, when constitutional requirements are involved, the proper execution of this duty is a matter of insuring due process of law as guaranteed by the Fourteenth Amendment. *Cf. Estelle v. McGuire*, 502 U.S. 62 (1991) (jury instruction violates Due Process Clause only if it affects some constitutional right).

II

In the matter before us, we confront an evident case of serious jury mistake and confusion. As Judge Thompson correctly says, "[e]leven jurors were confused and mistakenly thought they could not consider the eight instances of McDowell's background as mitigating evidence."

To say that the jury's mistake and confusion is of great constitutional concern is an understatement. In the watershed decisions of *Furman v. Georgia*, 408 U.S. 238 (1972), and then *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), the

Supreme Court made clear that the death penalty cannot be imposed under sentencing procedures that create a substantial risk that it will be imposed in an arbitrary and capricious manner. In order to reach a principled life or death decision, a jury *must* consider the evidence put forward by a defendant in mitigation of his culpable behavior. Such consideration is a constitutional imperative. As a plurality of the Court said in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), five years before McDowell's trial:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

A majority of the Court reiterated this message in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), five months before the murder for which McDowell stands convicted. The issue in *Eddings* was not the constitutionality of a limiting statute as in *Lockett*, but of a sentencing trial judge's conclusion that he could not " 'in following the law' " " 'consider the fact of this man's violent background.' " *Id.* at 112-13. The Court interpreted this statement to mean that "the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence." *Id.* at 113 (emphasis in original). In reversing the judgment of death, the Court offered this reasoning:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor,

> neither may the sentencer refuse to consider *as a matter of law*, any relevant mitigating evidence. In this instance, *it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf.*

*Id.* at 113-114 (emphasis in original and added).

I find the jury's note and its mistake and confusion in our case squarely to fit within the teaching of *Lockett* and especially *Eddings*. Although the jurors had been properly instructed, the *understanding* of eleven of them—shades of *Eddings*—was "as if the trial judge had instructed [them] to disregard the mitigating evidence [McDowell] proffered on his behalf." *Id.* I repeat the jury's note in relevant part:

> We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances *as being either testimony or evidence that should be considered.* Please advise which following circumstances can be considered mitigating circumstances.

(emphasis added). A list of factors then followed in the note, most of which clearly qualify under *Lockett* and *Eddings* as mitigating evidence. *See Skipper v. South Carolina* 476 U.S. 1, 4-5 (1986) (evidence is mitigating if it "might serve 'as a basis for a sentence less than death' ") (quoting *Lockett*, 438 U.S. at 601). Both McDowell's counsel and the prosecutor so advised the trial judge. The prosecutor did so while the jury was still present in court after the court's response as quoted by Judge Thompson. The prosecutor forthrightly said, "Well, I don't know if it is taking sides but those [factors listed by the jurors] are proper factors to consider." McDowell's counsel requested that the jurors be told that the matters to which the note referred could be considered as mitigating. Thus,

everyone in the courtroom understood that the defendant's mitigating evidence must be considered by the jury, everyone, that is, *except eleven of the jurors*—the most important participants at that stage of the proceedings.

The question, then, is whether the trial judge's response to the jury's note adequately corrected the eleven jurors' misunderstanding and dispelled the confusion. On reflection, I conclude on these facts, in these circumstances, and in the light of controlling authority, that it did not, and I so conclude for two main reasons.

First, although the judge referred the jurors to the instructions defining mitigating circumstances, these are the same instructions that for some unknown reason eleven of the jurors did not correctly understand or interpret in the first place. The trial judge made no effort to identify the exact problem confounding the eleven jurors or to remedy it. On this point, I agree with Justice Broussard of the California Supreme Court: "There is no point in reiterating language which has failed to enlighten the jury." *People v. McDowell*, 46 Cal. 3d 551 (1988) (Broussard, J., dissenting.)

Second, we have no idea whether the jurors read the instructions, but even presuming that they did, the record gives us no assurance whatsoever that having reread them, the mistake was corrected. All we know for sure is that the eleven jurors who initially did *not* understand that the law required them to consider McDowell's mitigating evidence ended up voting as they had while under the influence of their initial error. Under these circumstances, it would be sheer folly to presume—as we usually do—that they finally got it right and followed the instructions.

Using the test of *Boyde v. California*, 494 U.S. 370 (1990) as a guide, I conclude "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that

prevent[ed] the consideration of constitutionally relevant evidence."[2] *Id.* at 380.

Although I understand and sympathize with the trial judge's appropriate worry about saying anything that might coerce the jurors towards a verdict, the response given to their question simply did not clear away the juror's difficulty "with concrete accuracy." *Bollenbach*, 326 U.S. at 612-13. I fully realize as does Judge Thompson that the manner in which this clarifying task must be done is within the sound discretion of the district court, and that the Courts of Appeals have approved in some cases the practice of simply rereading or referring the jurors to the instructions already read, but *none* of those cases in their facts and circumstances are on a par with the instant case. In *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979), for example, the jury's question did not relate to a matter of constitutional concern, and the meaning of the note was merely "unclear." Consequently, we found no abuse of discretion in the trial judge's response, which was to reread the relevant instructions and to invite further questions "should the confusion persist." *Id.* at 631. *Collom* is easily distinguishable from our case.

McDowell's case is akin to *United States v. Warren*, 984 F.2d 325 (9th Cir. 1993) wherein we held that

> [i]n responding to the jury's inquiry in [the circumstances of that case] "it [was] not sufficient for the court to rely on more general statements in its prior charge." *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989). Referring the jury back to the original instruction would not correct the apparent impression of at least some jurors that intent "to hurt" rather than "to kill" might be sufficient to con-

[2]Parenthetically, the Supreme Court in *Boyde* had to presume confusion from an ambiguous instruction, *id.*; here we *know* eleven of the jurors were proceeding on an erroneous premise.

> vict Warren of first degree murder. The Court should have provided a supplemental instruction sufficient to clear up the uncertainty that the jury had brought to the court's attention. *Id.*[3]

*Id.* at 330.

There is no one-size-fits-all response to jury disorientation, and the sizes that may fit other facts and circumstances do not fit this case. As the Supreme Court has said many times, "the penalty of death is qualitatively different from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett*, 438 U.S. at 604 (internal quotations and citations omitted). To echo the Supreme Court in *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988), "[n]o one on this court was a member of the jury that sentenced [Charles McDowell]. We cannot say with any degree of confidence which interpretation [of the instructions McDowell's jury] adopted [after meeting with the trial judge]. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." *Id.* at 384.

The California Supreme Court observed that the trial court "properly could have explained to the jury that it was free to

[3]See *also United States v. Gordon*, 844 F.2d 1397, 1401-02 (9th Cir. 1988) (error to rely on original instruction where jury expressed confusion regarding conspiracy counts); *United States v. Walker*, 575 F.2d 209, 213 (9th Cir. 1978) (trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion); *United States v. Bolden*, 514 F.2d 1301, 1308-09 (D.C. Cir. 1975); (trial court rereading statute and standard instruction was insufficient where jury showed confusion); *United States v. Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975) (giving cursory supplemental instruction in face of jury confusion was insufficient); *Powell v. United States*, 347 F.2d 156, 157-58 (9th Cir. 1965) (responding to a jury's inquiry by merely rereading a facially correct instruction is inadequate).

consider *any* aspect of a defendant's background or character which defendant offered as a mitigating circumstance, and that some, if not all, of the listed factors, reasonably could fall within the category." *People v. McDowell*, 46 Cal. 3d at 578. Not only "could" the trial judge have done this, but in my view, after *Eddings* he was required to do so to preserve McDowell's right to a decision by the jury, as well as his right to a decision grounded in the law.

III

This conclusion requires me to address the State's argument that McDowell improperly asks us for the retroactive benefit of a new rule of constitutional law, in contravention of *Teague v. Lane*, 489 U.S. 288 (1989). I reject this argument. *Eddings* preceded McDowell's crime by five months, and his trial by over two years. The State's argument that we have never before elevated *Bollenbach* to a constitutional level is off-target. *Bollenbach* is not driving this case, *Eddings* is. The core constitutional issue here arises not from the behavior of the judge, but from the misunderstanding of the jurors. The inadequate response of the judge is germane only insofar as it did not ameliorate the condition threatening to deprive the defendant of his constitutional right to have the jury consider his evidence. Had the trial judge torn up the note and done nothing about it, the result I would reach would not only be the same, it would be more easily attained. McDowell's predicament in the main is no different than if the jury had not been properly instructed on mitigating circumstances. The holding I would reach neither "breaks new ground," nor is it something not "dictated by the precedent" existing before the defendant's trial. *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague*, 489 U.S. at 301).

Thus, I concur in the rest of Judge Thompson's opinion, but as to the judgment of death, I would reverse the district court and remand the matter to state court for a new penalty-phase trial.

## IV

Although I am quite sanguine about the technical accuracy and consequences of my analysis, the practical result is, to say the least, disturbing. The murder of Paula Rodriquez happened on May 20, 1982, almost 15 years ago to the day. McDowell's trial occurred in 1984, thirteen years ago. The matter then went in sequence: to the California Supreme Court on automatic direct appeal (decided in 1990); the United States Supreme Court on a petition for a writ of certiorari (denied); back through California to the California Supreme Court on habeas (denied); then to the United States Supreme Court on a second petition for certiorari (denied); to federal district court on habeas; back to the State to exhaust his claims and to file a second state petition for habeas corpus (denied by the California Supreme Court); back to the federal district court for an extensive hearing (denied); and now to us.

The tortured history of this case and the amount of time it is taking to reach a final resolution makes our system of justice look more like an agonizing degenerative disease than a model of due process of law. I can only hope that the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), will bring this variety of glacial litigation under control.

Given how long it takes to bring cases like this to closure, it is little surprise that the public's confidence in its system of justice is not what it should be. With nine vacancies out of twenty-eight authorized judges in the United States Court of Appeals for the Ninth Circuit, however, one wonders how Congress and the President expect us promptly to process our ever increasing 8000-plus caseload, which will include in the foreseeable future over 700 death penalty cases from California alone. Our current 9 vacancies mean we will process 1500 fewer cases this year than we could with a full bench. To the litigants who wait in line for us to resolve their disputes, this unnecessary disability is unpardonable. At the very least, the

President and Congress must quickly fill the vacancies on the federal courts, which by September of this year will increase to 10 appellate judges in our circuit (over one-third of our authorized strength). In a country that prides itself on being a nation of laws rather than just a nation of leaders, and which exalts the rule of law as the appropriate method of resolving controversies, we must do better in keeping our civil and criminal justice system able without unnecessary delay to deliver to the People the important promises of our Constitution.

# Appendix C

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FOR PUBLICATION

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES E. McDOWELL,
*Petitioner-Appellant,*

v.

ARTHUR CALDERON, Warden of the California State Prison at San Quentin,
*Respondent-Appellee.*

No. 96-99000
D.C. No.
CV-90-04009-MRP
OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
November 21, 1996—San Francisco, California

Filed February 26, 1997

Before: Charles Wiggins, David R. Thompson and Stephen S. Trott, Circuit Judges.

Opinion by Judge Thompson

## SUMMARY

### Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court. The court held that in a capital murder prosecution, defense counsel's delay in obtaining drug testing that produces no significant result does not establish ineffective legal

assistance, when the other evidence shows no intoxication of the defendant at the time the sample was taken, or destabilization of the sample at the time of testing.

Appellant Charles McDowell was charged with murder and other crimes with special circumstances. The evidence of McDowell's guilt was overwhelming. About a year after his arrest, McDowell informed a defense paralegal that on the day of the murder, he had ingested alcohol and controlled substances. About a month later, defense attorney Gillingham ordered testing of blood and urine samples obtained from McDowell on the day of his arrest. Both the tests and the police report of testing on the day of McDowell's arrest showed no significant presence of drugs or alcohol.

Gillingham retained mental health experts, including Drs. Vicary, Maloney and Murphy. Murphy produced a report that was extremely damaging to McDowell; Vicary and Maloney received copies. Gillingham decided not to call any mental health expert during the penalty phase.

During the guilt phase, Gillingham conceded guilt, but asserted that McDowell did not have the intent to kill required to establish the special circumstances. He asserted that McDowell had assaulted the victim only for the purpose of raping her, and had used the murder weapon only to threaten her. The jury deliberated for two days before returning a guilty verdict.

In the penalty phase, the prosecution presented evidence of a conviction for lewd and lascivious conduct involving Curtis M., and an uncharged rape involving Patricia H. In mitigation, defense counsel presented evidence of McDowell's tragic and traumatic childhood. Gillingham was prepared to offer additional mitigation evidence in the form of testimony of family members, but McDowell objected. After the testimony of an uncle, Gillingham presented no further mitigation evidence.

During closing argument, the prosecutor asserted that the jury could consider as an aggravating factor the absence of evidence of extreme mental or emotional disturbance or mental impairment.

During the third day of deliberations, the jury asked the trial court to provide direction on whether various events and conditions in McDowell's personal history could be considered as mitigating evidence. The trial court instructed the jury to reread the jury instructions listing aggravating and mitigating factors, and reread one of the instructions. The jury deliberated further and returned a death verdict.

The California Supreme Court affirmed McDowell's conviction and sentence. The United States Supreme Court denied his certiorari petition. The California Supreme Court denied McDowell's habeas corpus petition; the United States Supreme Court denied his second certiorari petition.

On federal habeas corpus, the district court granted McDowell leave to file a second state petition to exhaust his claim of ineffective assistance of trial counsel. The California Supreme Court denied the petition. The district court denied McDowell's amended habeas petition, but granted a certificate of probable cause. McDowell appealed.

[1] McDowell had to establish that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. He had to overcome a strong presumption the counsel rendered adequate assistance and exercised reasonable professional judgment in making decisions. [2] McDowell also had to establish that prejudice resulted by demonstrating that but for counsel's unprofessional errors, the result would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome.

[3] Gillingham's investigation into McDowell's alleged intoxication was not constitutionally deficient. [4] McDowell

did not demonstrate that Gillingham rendered ineffective assistance by failing to have the samples tested earlier, or that any delay in testing them affected the validity of the tests.

[5] Even if it were assumed that Gillingham's performance was deficient, McDowell did not establish that prejudice resulted. Even if the test results were obtained that indicated McDowell was under the influence of alcohol and controlled substances at the time of the murder, there was ample credible evidence that would have contradicted such tests, and established that McDowell was not so intoxicated that he could not have formed the intent to kill.

[6] The evidence of guilt was overwhelming. Gillingham chose to concede McDowell's guilt of felony murder, but to contest whether he had the intent to kill. The choice of this line of defense appeared to have been the best choice from a poor lot. [7] Gillingham's performance was not deficient.

[8] By referring the jury to the original instructions and rereading an instruction, the state trial court accurately informed the jury of the applicable law and adequately responded to the jury's question. [9] To obtain federal habeas relief, McDowell had to demonstrate that any inadequacy in the instructions violated his federal constitutional rights.

[10] McDowell had a constitutional right to have the jury consider any mitigating evidence he presented. [11] But the inquiry was not whether the jury was confused when they wrote the question, but whether the trial court dispelled any confusion. [12] The original jury instructions correctly instructed the jury to consider all the mitigating evidence. [13] The trial court referred the jury to the instructions. This was directly responsive to the jury's question and correctly told the jury that they could consider as mitigating evidence anything in McDowell's background. [14] This was sufficient to dispel any confusion they might have had.

[15] For penalty phase claims, McDowell had to establish that absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. [16] Gillingham's decision not to call mental health experts was clearly strategic. [17] Even if it were assumed that Gillingham's performance was deficient, McDowell did not demonstrate prejudice. [18] When the aggravating circumstances are overwhelming, it is particularly difficult to show prejudice at sentencing due to alleged failure to present mitigation evidence. There is also a risk associated with presenting a defense based on mental incapacity, and expert testimony is not a panacea for damaging aggravating evidence. [19] McDowell did not show prejudice.

[20] Gillingham did not present further mitigating evidence because he was forced to balance his obligations as an advocate with his client's strongly held views as to the manner in which to present the defense. Even in light of McDowell's objections, Gillingham presented substantial mitigating evidence of physical abuse. Gillingham could not be faulted for failing to present further mitigating evidence. [21] Even if it were assumed that Gillingham's performance was deficient, McDowell did not demonstrate prejudice. The jury chose a sentence of death after hearing evidence of McDowell's tragic childhood and severe physical abuse.

[22] Gillingham's choice not to specifically relate the evidence to the statutory factors was clearly strategic. He spoke to the jury in lay terms and pleaded for mercy. [23] Faulting Gillingham for failing to link the mitigating evidence to the specific statutory factors would probably have narrowed the boundaries of acceptable argument style too much. Gillingham was not constitutionally required to tell the jury that they could consider the mitigating evidence. The trial court told them in its instructions.

[24] The prosecutor properly could have argued that there was no evidence of mental impairment or intoxication and

that the jury could consider this lack of evidence. However, the prosecutor could not argue that this lack of evidence constituted an aggravating factor. [25] Nevertheless, the California Supreme Court determined that any error was harmless. Both Gillingham and the trial court guarded against a reasonable possibility that the argument affected the verdict.

[26] A sentencer may rely on criminal conduct not resulting in a conviction if it has some minimal indicium of reliability beyond mere allegation. [27] The evidence of the child molestation was sufficiently reliable. McDowell was actually convicted by his plea to that conduct. With regard to the rape, McDowell escaped arrest by fleeing and confirmed that he was wanted for rape at the time of his arrest for murder. [28] McDowell's counsel cross-examined the witnesses to test the reliability of their testimony. [29] The trial court instructed the jury that they had to find beyond a reasonable doubt that McDowell committed the crimes.

[30] Although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial. McDowell did not show that the cumulative effect of any alleged errors deprived him of due process.

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## COUNSEL

Andrea G. Asaro, Rosen, Bien & Asaro, San Francisco, California, for the petitioner-appellant.

Robert F. Katz, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

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## OPINION

THOMPSON, Circuit Judge:

In 1984, a jury in California found Charles E. McDowell, Jr., guilty of murder, attempted murder, attempted rape, and burglary. The jury found true the special circumstances of felony murder/burglary and felony murder/rape. McDowell was sentenced to death.

After exhausting his claims for relief in state court, McDowell filed his first amended petition for federal habeas relief in the district court. This is an appeal from the denial of that petition. In the petition, McDowell argues he received ineffective assistance of counsel during the guilt phase of his trial and asserts several errors occurred during the penalty phase. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

## FACTS

On May 20, 1982, Paula Rodriguez was working as a house cleaner at the Bardsley residence. At that time, McDowell was living with his companion, Lea D'Crenza, in the same neighborhood. At approximately 1:00 p.m., neighbors heard screams coming from the Bardsley residence. Theodore and Dolores Sum telephoned the Bardsleys. They heard more screams through the telephone and then it was disconnected.

The Sums went to the Bardsley home to investigate. Theodore Sum opened the front door and saw a nude man whom he identified at trial as McDowell. McDowell rushed at Theodore Sum and slashed his neck with a knife. The Sums returned to their home and telephoned the police. McDowell was later seen running from the Bardsley home, into the D'Crenza home, and then, later, walking away from the D'Crenza home.

Police officers immediately arrived at the Bardsley home and found Rodriguez stabbed to death in the den. She had been cut twice on the neck; stabbed twice in the chest, once in the abdomen, and once in the left arm; and had deep knife wounds on her hands. She was lying in a supine position with her skirt pulled up, her legs apart, her underwear cut, her blouse slashed, and her body covered with blood. Seminal fluid was found on her underwear. Police officers found her two-year old daughter unharmed upstairs.

Police Officer Henry Petroski followed a trail of blood from the front door of the Bardsley home onto the sidewalk. The trail of blood led to the D'Crenza home. Officer Petroski entered the D'Crenza home and followed the trail of blood through the home. A bloodstained knife was lying on the floor in the kitchen. Officer Petroski followed the trail outside the home to a house approximately 850 feet away from the D'Crenza home.

From the bushes, Officer Petroski heard a male voice say, "Don't shoot me. Don't shoot me. I give up." Officers pulled McDowell from the bushes and arrested him. McDowell's wrist and a finger were cut. He was transported to a hospital for medical treatment.

En route to the hospital and during his stay at the hospital, McDowell made several damaging statements. For example, McDowell stated that he had watched a movie the night before which involved the rape, strangulation, and stabbing of a woman. He stated that he "felt a force" come over him and the movie made him decide to go to the Bardsley home and "hurt" Rodriguez. He further stated that the blood on his clothing belonged to Rodriguez.

McDowell was charged with murder, attempted murder, attempted rape, and burglary, in violation of California Penal Code Sections 187, 261, 459, and 664. Two special circumstances were alleged: felony murder/burglary, under Califor-

nia Penal Code Section 190.2(a)(17)(vii), and felony murder/rape, under California Penal Code Section 190.2(a)(17)(iii).

During the guilt phase of his trial, McDowell conceded guilt to the murder, rape, and burglary. He argued, however, that he did not have the intent to kill Rodriguez and, therefore, was not guilty of the special circumstances. After two days of deliberation, the jury found McDowell guilty on all counts and found true the special circumstances.

During the penalty phase, the prosecution presented evidence of two prior crimes committed by McDowell: a conviction for lewd and lascivious conduct, involving Curtis M.; and an uncharged rape, involving Patricia H.

In mitigation, McDowell's counsel presented family members and a former neighbor who testified about McDowell's tragic childhood, a nurse who was his primary therapist when he was incarcerated in a Mentally Disordered Sex Offender program, and a probation officer who supervised McDowell after the Curtis M. offense. After two-and-one-half days of deliberation, the jury returned a verdict of death. The state trial court imposed the death sentence.

The California Supreme Court affirmed the conviction and sentence. *People v. McDowell*, 763 P.2d 1269 (Cal. 1988). The United States Supreme Court denied McDowell's petition for certiorari. *McDowell v. California*, 490 U.S. 1059 (1989). In September 1989, the California Supreme Court denied McDowell's first state habeas corpus petition by a postcard denial. In March 1990, the United States Supreme Court denied McDowell's second petition for certiorari. *McDowell v. California*, 494 U.S. 1039 (1990).

In December 1990, McDowell filed his first federal habeas corpus petition with the district court. In October 1991, the district court granted McDowell leave to file a second state petition to exhaust his ineffective assistance of counsel

claims. By a postcard denial, the California Supreme Court denied the petition in July 1992. McDowell filed his amended petition in the district court in May 1993.

The district court denied McDowell's petition in November 1995, but granted McDowell a certificate of probable cause. This appeal followed.[1]

## DISCUSSION

### A. General Standards of Review

To warrant federal habeas corpus relief, McDowell, a state prisoner, must establish that his conviction or sentence violates the federal Constitution, a federal statute, or treaty. *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 718 (1996). We review de novo the district court's denial of his habeas corpus petition. *Weygandt v. Ducharme*, 774 F.2d 1491, 1493 (9th Cir. 1985). We review for clear error any factual findings made by the district court; the state court's factual findings are entitled to a presumption of correctness. *Bonin*, 59 F.3d at 823; 28 U.S.C. § 2254(d); *Melugin v. Hames*, 38 F.3d 1478, 1482 (9th Cir. 1994).

### B. Ineffective Assistance of Counsel – Guilt Phase

McDowell argues his counsel, Howard Gillingham, rendered ineffective assistance during the guilt phase of his trial because (1) Gillingham failed to adequately investigate and to

[1]We do not apply in this appeal the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("the Act"). We have held that Chapter 153 of the Act does "not apply to cases filed in the federal courts of this Circuit prior to the Act's effective date of April 24, 1996." *Jeffries v. Wood*, 1996 WL 730493, at *1 (9th Cir. Dec. 20, 1996). The State concedes that in this case Chapter 154 is inapplicable. Moreover, because nothing in the Act benefits McDowell, and we affirm the denial of McDowell's habeas petition without reference to the Act, there is no point in considering it in this case.

present a defense based on McDowell's alleged intoxication at the time of the murder; and (2) during closing argument, Gillingham conceded McDowell's guilt of felony murder, and then did not effectively argue why McDowell lacked the intent to kill, which lack of intent would have rendered him not guilty of the special circumstance required for a sentence of death in a felony murder conviction.

Because a claim of ineffective assistance of counsel raises a mixed question of law and fact, we review the claim de novo. *Harris v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995). We review de novo whether counsel's performance was deficient and whether prejudice resulted from any deficient performance. *Thompson v. Calderon*, 86 F.3d 1509, 1515 (9th Cir. 1996); *see also Strickland v. Washington*, 466 U.S. 668, 698 (1984) (concluding state court's determination that counsel's performance was not deficient is not a finding of fact entitled to a presumption of correctness).

[1] McDowell first must establish that his " 'counsel's representation fell below an objective standard of reasonableness . . . considering all the circumstances . . . under prevailing professional norms.' " *Harris*, 64 F.3d at 1435 (quoting *Strickland*, 466 U.S. at 688). McDowell must overcome a "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making decisions." *Thompson*, 86 F.3d at 1515 (internal quotations and citation omitted).

[2] McDowell also must establish prejudice resulted from any deficient performance. *Id.* He must demonstrate " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 694).

1. Intoxication Defense

McDowell asserts Gillingham's performance was deficient because he failed to timely investigate whether McDowell was under the influence of alcohol or various controlled substances at the time of the murder. McDowell complains that Gillingham did not obtain timely testing of his blood and urine samples, taken on the day of his arrest. He argues that, had Gillingham presented evidence of his alleged intoxication[2] at the time of the murder, the jury would have found he did not have the intent to kill which, at that time, was an element of the felony murder special circumstances. *See Carlos v. Superior Court*, 672 P.2d 862, 865 (Cal. 1983), *overruled by People v. Anderson*, 742 P.2d 1306 (Cal. 1987).

McDowell contends Gillingham had the following information which should have prompted a thorough and timely investigation into McDowell's alleged intoxicated state at the time of the murder: Approximately a year after his arrest, in March 1983, McDowell told Marilyn Butler, a law clerk helping Gillingham, that, on the morning of the murder, he had consumed alcohol and various controlled substances. McDowell also told experts retained by Gillingham that he had consumed excessive alcohol and controlled substances on the morning of the murder. In addition, Speare Primpas, a friend of McDowell, and D'Crenza both told Gillingham that McDowell used drugs extensively.

[3] Gillingham's investigation into McDowell's alleged intoxication was not constitutionally deficient. Gillingham requested the testing of the samples a month after McDowell told Butler he had consumed alcohol and controlled substances on the morning of the murder. The police department's report, dated May 20, 1983, stated controlled

[2]In this opinion, "intoxication" refers to being under the influence of alcohol and/or controlled substances.

substances were not detected and McDowell's blood alcohol level was .011 at the time his blood sample was taken.[3]

Gillingham then independently had the samples tested. A report from the Institute of Forensic Sciences, dated July 5, 1983, reported no cannabinoids, ethanol, narcotics, or stimulants were detected. A report from the Center for Human Toxicology, dated October 5, 1983, reported that no LSD was detected and only a trace of THC. A note from Gillingham indicates that the THC testing indicated the marijuana was ingested days rather than hours before the samples were taken. In these circumstances, Gillingham's failure to pursue further testing of the samples was not constitutionally deficient.

[4] McDowell also has not demonstrated that Gillingham rendered ineffective assistance by failing to have the samples tested earlier. McDowell has not shown that any delay in testing the samples affected the validity of the tests. The facilities that actually did the independent testing for Gillingham did not indicate that the results might be inaccurate due to a delay in testing. The State contradicted McDowell's expert testimony, presented during the evidentiary hearing before the district court, that the alcohol in the blood sample could have dissipated over time. The State's expert testified that the test samples would have remained stable while in storage at the police department.

[5] Even if we were to assume Gillingham's performance was deficient, McDowell has not established that prejudice resulted from Gillingham's alleged failure to adequately investigate or to present an intoxication defense. Even if test results were obtained that indicated McDowell was under the

[3]The sample was taken approximately seven hours after the murder. Experts for McDowell and the State agreed the average burn-off rate would be .02 per hour. Using this burn-off rate, McDowell's blood alcohol level at the time of the murder would have been approximately .151.

influence of alcohol and controlled substances at the time of the murder, there was ample credible evidence which would have contradicted such tests and established that McDowell was not so intoxicated that he could not have formed the intent to kill.

A news crew videotaped McDowell's arrest. On the videotape, McDowell yells, "I'm wanted for rape in Florida. You can have all you want." After viewing the videotape, the district court found that McDowell was portrayed "in a state not resembling intoxication." This finding is not clearly erroneous. On the videotape, McDowell does not appear intoxicated. Further, after Gillingham and his experts viewed the videotape, they also came to the conclusion that McDowell did not appear intoxicated. Had an intoxication defense been presented, the jury would have viewed the videotape and likely would have reached the same conclusion.

In addition, Officer Petroski, an arresting officer, stated McDowell was not "under the influence of anything" at the time of his arrest. In his report, Officer Michel, an officer who transported McDowell to the hospital after his arrest, described McDowell's behavior in detail but did not suggest or mention that McDowell was intoxicated. Glenn Smith, a paramedic who treated and transported McDowell after his arrest, testified that he was trained to recognize when people are under the influence of intoxicants, but he did not notice any symptoms that McDowell was under the influence of alcohol or controlled substances. Also, the hospital records indicate McDowell was conscious, alert, and coherent and do not indicate that McDowell was intoxicated at the time of his arrest.

In sum, Gillingham did not render ineffective assistance by failing to earlier test the samples or to further pursue an intoxication defense. Even if the samples might have indicated some degree of intoxication, there was substantial credible

evidence that McDowell's behavior was not affected. McDowell suffered no prejudice.

2. Closing Argument

McDowell argues Gillingham rendered ineffective assistance during closing argument by conceding his guilt of felony murder. McDowell also contends he received ineffective assistance because, during closing argument, Gillingham argued that McDowell lacked the intent to kill which was an element of the special circumstances, but did not explain how the evidence related to this lack of intent. Gillingham's performance in this regard was not constitutionally deficient.

[6] The evidence of McDowell's guilt of felony murder was overwhelming. Gillingham chose to concede McDowell's guilt of felony murder but to contest whether McDowell had the intent to kill. If McDowell did not have the intent to kill, he would not have been eligible for the death sentence. The choice of this line of defense appears to have been the best choice from a poor lot. *See Hendricks v. Calderon*, 70 F.3d 1032, 1042 (9th Cir. 1995) ("The choice to pursue a bad strategy makes no comment on an attorney's judgment where no better choice exists."), *cert. denied*, 116 S. Ct. 1335 (1996).

[7] We also reject McDowell's argument that Gillingham failed to present a viable argument for the jury to find McDowell did not possess the intent to kill. Gillingham argued that McDowell went to the residence with only the intent to rape Rodriguez rather than to kill her and he brought the knife with him only to threaten her. He argued that McDowell's conduct was inconsistent with a plan to kill.[4] Gillingham's performance was not deficient.

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[4]For example, McDowell's counsel argued:

> May 20th, mid afternoon, clad in shorts only, no automobile available for pre-planned escape, no disguise or calculated change of appearance.

## C. Supplemental Instructions

[8] McDowell next argues the state trial court erred by failing to give supplemental instructions, in response to a question from the jury during deliberations in the penalty phase. He asserts this error prohibited the jury from considering the mitigating evidence he presented. We conclude that, by referring the jury to the original jury instructions and by rereading an instruction, the state trial court accurately informed the jury of the applicable law and adequately responded to the jury's question.

During the third day of deliberations in the penalty phase, the jury sent the court a note which stated:

> We, the jury in the above entitled action, request the following:

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. . .

He went over there to kill her, and he took the cigarettes, he took the lighter? I don't think so. I don't think so.

. . .

Let's focus on Mr. McDowell's actions after. Are they consistent with anything other than confusion and frenzy? Are there signs of calculation and plan? The open door as he returns to D'Crenza's leaving it open.

The knife tossed on the floor apparently or dropped right in plain sight in the kitchen.

The shorts draped over the faucet in the bathroom. The towel thrown on the floor. It's in evidence also.

The tape that was grabbed with the bloody hand. Still shirtless, he leaves.

The actions of something or someone involved in something that went wrong. A trail of blood and evidence leading to his arrest; and on that trail is he running? Is he sneaking?

> Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.
>
> 2. Love/hate relationship with father/mother.
>
> 3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.
>
> 4. Religious extremes confused defendant.
>
> 5. Confusing sexual mores at home (incest), with mother condoning or aware of incest/abuse.
>
> 6. Accused of death of favorite sister.
>
> 7. Stress of divorce from family.
>
> 8. Rejection of mother's love during teen years.
>
> Thank you.

In a hearing outside the presence of the jury, the state trial court stated:

> I feel I cannot say anything in light of the sentence which indicates which way they are voting, and anything I say at this particular time will be coercive.
>
> . . .

> They are asking me to interpret the evidence; something I cannot do.

Counsel for McDowell's position was, "in my judgment the question could be answered; that the mitigating — or the circumstances, the circumstances named, are proper circumstances."

The state trial court responded to the jury's question:

> You're asking me, in essence, to decide the case for you. You have been instructed as to the law and I hate to throw you out like this.
>
> But if you go back and read the instructions, in particular you have one instruction in which the mitigating and aggravating factors are listed.
>
> Then you have another instruction, the concluding instruction which reads as follows:
>
> "One mitigating circumstance may outweigh several aggravating circumstances or one aggravating circumstance may outweigh several mitigating circumstances. You shall give each the weight to which you find it to be entitled."
>
> Those are the two instructions that I think really apply. I would ask you to go back, reread those instructions . . . .

The jury resumed deliberations on Friday afternoon and, after a weekend break, returned a verdict of death.

The jury's question can be interpreted to mean that, at the time the jury wrote it, eleven jurors were confused and mistakenly thought they could not consider the eight instances of McDowell's background as mitigating evidence. This confu-

sion, McDowell argues, was not dispelled by the state trial court's response, and as a result he was denied a fair trial and is entitled to federal habeas relief.

[9] To obtain federal habeas relief, McDowell must demonstrate that any inadequacy in the instructions violated his federal constitutional rights. *Thompson*, 86 F.3d at 1521 (stating "Giving an instruction inadequate by direct appeal standards does not necessarily result in habeas relief from a state court conviction."); *see also Duckett v. Godinez*, 67 F.3d 734, 744 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1549 (1996).

[10] McDowell clearly has a constitutional right to have the jury consider any mitigating evidence he presents. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Although the jury determines the appropriate weight to be given to the mitigating evidence, the jury "may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15.

[11] Our inquiry, however, is not whether the jury was confused at the time they wrote the question, but whether the state trial court adequately responded to their inquiry and dispelled any confusion they might have had. When a jury expresses confusion, the state trial court must respond with "sufficient specificity to clarify the jury's problem." *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir.) (citing *Bollenbach v. United States*, 326 U.S. 607 (1946)), *cert. denied*, 459 U.S. 975 (1982). The state trial court must clear away with "concrete accuracy" the jury's misunderstanding that it cannot consider the mitigating evidence. *See Bollenbach*, 326 U.S. at 612-13.

[12] The state trial court's original instructions correctly instructed the jury that they could consider all the mitigating evidence presented by McDowell. In the original instructions, the state trial court listed the aggravating and mitigating fac-

tors under California Penal Code Section 190.3 and stated the jury "shall" consider those factors. One of the factors was:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death.

[13] The state trial court referred the jury to this instruction in response to the jury's question, and instructed the jury to read it. This instruction was directly responsive to the jury's question and correctly told the jury that they could consider as mitigating evidence anything in McDowell's background.

McDowell argues this was not good enough. He contends the state trial court should have given the jury supplemental instructions, instructions framed in some different language which would have informed the jury that each of the eight factors listed in the jury's question could be considered as a mitigating circumstance and that each factor should be given whatever weight the jury deemed appropriate.

The state trial court could have elaborated and answered the jury's question in this fashion, but the Constitution does not require the court to give the best available answer. We have approved a practice of referring the jury to the original instructions when those instructions correctly answer the jury's question. *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 446 U.S. 923 (1980). We cannot assume the jury remained confused after the state trial court specifically told them to read the particular original instruction which told them in no uncertain terms that they could consider any evidence of McDowell's background as mitigating evidence.[5]

[5]Juror Connie Jackson Kimble, the holdout juror, has submitted a declaration in which she states that the state trial court's response did not "help

[14] The state trial court's response to the jury's question was sufficient to dispel any confusion they might have had.

D. Ineffective Assistance of Counsel – Penalty Phase

McDowell argues Gillingham rendered ineffective assistance at the penalty phase because Gillingham (1) failed to call a mental health expert as a witness; (2) failed to present mitigating evidence of McDowell's sexual abuse as a child and his chronic substance and alcohol abuse; and (3) during closing argument, Gillingham failed to adequately argue the mitigating effect of McDowell's background. These arguments lack merit.

[15] McDowell must demonstrate that Gillingham's representation was constitutionally deficient and that prejudice resulted. *Strickland*, 466 U.S. at 688. For penalty phase claims, the prejudice prong requires McDowell to establish that, absent the errors, "the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695; *see also Hendricks*, 70 F.3d at 1036-37.

1. Mental Health Expert

Gillingham retained three mental health experts: Doctor Vicary, a forensic psychiatrist; Doctor Maloney, a clinical psychologist; and Doctor Murphy, a psychologist with an expertise in homosexuality. Doctor Murphy interviewed McDowell on two occasions and prepared a report which revealed extremely damaging information about McDowell.

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us in resolving our dispute" and that another juror told her that the factors she was focusing on "were not relevant and that they were inconsistent with the instructions." This evidence is not admissible to impeach the verdict. Fed. R. Evid. 606(b); *Hard v. Burlington N.R.R. Co.*, 870 F.2d 1454, 1460 (9th Cir. 1989); *Walker v. United States*, 298 F.2d 217, 226 (9th Cir. 1962).

The report revealed an obsession with rape and violence against women, "masochistic overtones to his homosexual activity," and a lack of remorse or acceptance of responsibility for his behavior. For example, in the report Dr. Murphy stated:

> When asked about obsessive thoughts, he mentioned he was always obsessed with having sex with young boys. . . . Another obsession related to rape of women. . . . His most prominent sexual fantasy is as follows:
>
> > He finds a woman and brings her to a house he has built. The house has a labyrinth of dungeons, in which there are five dungeons one being enclosed in another. He places his female victims in the dungeons progressively and when he reaches the last dungeon, he not only rapes the woman, but then either slits her throat or strangles her to death.
>
> He indicated he saw himself as the "lowest scum on earth" then a few minutes later was berating inmates who thought they were so good and said he was as "good as any of them."
>
> . . .
>
> [McDowell] is fascinated by WW II and wishes he had lived in that period. He is particularly interested in the Nazi concentration camps and the sadistic treatment of prisoners.
>
> . . .
>
> He opined that he may have gotten drunk and thought about the [Rodriguez] murder as a punish-

> ment for [his lover's] lack of recognition [of his work] and the argument between them.
>
> . . .
>
> When asked about his previous incarcerations and institutionalizations, he indicated he was able to manipulate mental health practitioners to think what he wanted.
>
> . . .
>
> He reported uncontrollable rages when married that were usually caused by alcohol intoxication. He stated his wife had him arrested and at the same time a broad smile came across his face.

Doctor Murphy distributed his report to Gillingham, Doctor Maloney, and Doctor Vicary. During the evidentiary hearing before the district court, Gillingham testified that he met with Doctor Vicary during the guilt phase of the trial and, at that time, recalled that Doctor Vicary had received a copy of Doctor Murphy's report. Gillingham then decided not to call Doctor Vicary or any other mental health expert during the penalty phase and did not retain another mental health expert.

[16] Gillingham's decision not to call Doctor Vicary as an expert or to call another mental health expert clearly was a strategic decision. Had Gillingham called Doctor Vicary, the prosecution likely would have elicited the extremely damaging information in the Murphy report. If Gillingham retained another expert, it would have been difficult not to reveal the information within the Murphy report to the new expert. If Gillingham did not provide the Murphy report to a newly retained expert, the new expert would have been compelled to testify that he or she did not receive all the reports and there was a missing report. Further, if Gillingham called an expert witness, the prosecution certainly would have called its own

expert and no doubt would have requested an examination of McDowell by its expert.

There was also a reasonable likelihood that a new expert would obtain comparable or other damaging information from interviewing McDowell. Indeed, Doctor Maloney's report also is very damaging. In his report, Doctor Maloney states: "adults with [McDowell's] profile may report behavior characterized by poorly socialized aggression, authority conflicts, unexpected violent outbursts and . . . the extreme by such acts as unprovoked bar knifings, 'Manson type' killings and bizarre sado-masochistic sexuality."

Moreover, to date, no expert has opined that McDowell suffers from a mental impairment which likely would elicit sympathy from the jury in light of the overwhelming aggravating evidence. In his report, Doctor Maloney states:

> It appears that his father was abusive, but it also appears that [McDowell] may attribute a number of problems to his father that are only tenuously connected.
>
> . . .
>
> [H]is mental status is essentially normal.
>
> . . .
>
> His overall pattern of performance is not suggestive of an individual who has any significant emotional disturbance, such as a functional psychosis or organic brain syndrome.
>
> . . .
>
> There is some suggestion that he may have been exaggerating his psychological problems.

. . .

> Most persons with similar profiles are considered to straddle the fence between a personality disorder and psychosis.
>
> . . .
>
> Present data do suggest that Mr. McDowell has a serious emotional disturbance. It does not appear to be a psychotic-like disturbance, in the sense that his thinking processes are generally intact and there is no suggestion of any obvious disruption in his ability to perceive reality.

[17] We conclude Gillingham did not render deficient assistance by choosing not to call an expert witness. However, even if we were to assume Gillingham's performance was deficient, McDowell has not demonstrated prejudice.

McDowell argues that Gillingham should have called Doctor Vicary as an expert witness because he would have "tied up" the mitigating evidence and would have explained to the jury how McDowell's violent conduct was caused by his sexual abuse as a minor. In a declaration submitted in support of McDowell's habeas petition, Doctor Vicary states he would have testified as follows:

> I had formed the opinion generally that Mr. McDowell's personal background was literally traumatic, and had left him clinically psychologically disturbed.
>
> . . .
>
> I would also have sought to tie together all of the evidence . . . obtained . . . in an effort to explain Mr. McDowell's personal history and mental condition to the jury. Thus I would have sought to explain to

> the jury the relationship, psychologically and behaviorally, between Mr. McDowell's personal background and his criminal acts — what it is that makes the various aspects of Mr. McDowell's tragic and abusive personal history mitigating circumstances. In this regard I would have explained to the jury that the nature of his criminal conduct is consistent with and explained by his personal history of enduring and witnessing physical and sexual abuse, and by his chronic and acute substance abuse.

[18] This evidence is far from compelling. Indeed, it offers little to combat the overwhelming aggravating circumstances. "[W]here the aggravating circumstances are overwhelming, it is particularly difficult to show prejudice at sentencing due to the alleged failure to present mitigation evidence." *Bonin*, 59 F.3d at 836. Further, there is a negative risk associated with presenting a defense based on mental incapacity, and expert testimony is not a panacea for damaging aggravating evidence. *See id.* at 834-35.

[19] McDowell has not shown prejudice. He has not demonstrated a reasonable probability that the introduction of Doctor Vicary's proposed testimony or other expert testimony would have changed the jury's sentencing decision. *See id.* at 836.

2. Mitigating Evidence Not Introduced

McDowell next contends Gillingham rendered ineffective assistance by not presenting available mitigating evidence relating to his background.

McDowell's defense during the penalty phase focused on his father's physical and psychological abuse of him throughout his childhood. McDowell presented evidence that he suffered severe beatings, on a daily basis, from the time he was only weeks old. His maternal uncles testified that McDowell's

father beat him severely on a daily basis. His brother also testified that his father beat McDowell severely, including beating him with a two-by-four. A former neighbor testified that McDowell's father severely beat McDowell and his brother and that she witnessed McDowell's frequent bruises. Finally, his mother testified that McDowell's father beat him daily, starting when he was three weeks old, and blamed him for the death of his sister. She testified that on one occasion his father held him over a fire and beat him to the point of needing an operation. She testified she was not close to McDowell because of her belief that he was a homosexual.

Although Gillingham presented the foregoing evidence of physical abuse, he did not present evidence of the sexual abuse McDowell suffered from his uncle and other relatives or of his history of substance and alcohol abuse. The district court determined that, by failing to present such evidence, Gillingham's performance was not deficient. We agree.

As correctly found by the district court, Gillingham expended considerable effort in investigating McDowell's background and was prepared to present further mitigating evidence. However, as found by the district court, a conflict over strategy during the penalty phase arose between McDowell and his lawyer, Gillingham.

After the state trial court continued the penalty phase over the weekend to allow Gillingham to confer with McDowell and his family members, Gillingham told the court that disagreement continued between him and McDowell. McDowell told the state trial court:

> There are witnesses that we have that I have no discrepancies about, but there are some I would rather he not bring on for the fact that it will bring — or open old wounds that are not necessary to be opened regardless to what the consequences of myself is.

> I don't feel that these witnesses can help me. They can only hurt myself and my family. And these witnesses, I might add, are a part of my family.
>
> There are two witnesses I don't mind bringing in and questioning and whatever, but the rest of them, as far as my family is concerned, I would rather they not be brought in.

After the testimony of the first defense witness, Marshall Brakefield, a maternal uncle, Gillingham explained at a sidebar conference that McDowell asked to be excused and "He was opposed to all of this. I have just asked him if he could deal with it at least up until his mother. He thinks he can." The next morning, Gillingham informed the court that the bailiff had discussed shackling McDowell due to his agitation.

[20] As found by the district court, Gillingham did not present further mitigating evidence because he "was forced to balance his obligations as an advocate with his client's strongly held views as to the manner in which to present the defense." Even in light of McDowell's objections, Gillingham was successful in presenting a substantial amount of mitigating evidence of physical abuse. Gillingham cannot be faulted for failing to present further mitigating evidence, much of which would have been cumulative.

[21] However, even if we were to assume Gillingham's performance was deficient because he failed to introduce additional evidence of abuse, including sexual abuse and substance abuse, McDowell has not demonstrated prejudice. The jury chose a sentence of death after hearing evidence of McDowell's tragic childhood and the severe physical abuse he suffered. In light of this mitigating evidence and the overwhelming aggravating circumstances, McDowell has not demonstrated a reasonable probability that had Gillingham introduced more evidence of abuse, McDowell's sexual abuse

and substance abuse, the jury would have chosen a different sentence. *See id.*

3. Closing Argument

McDowell contends Gillingham rendered ineffective assistance during his closing argument in the penalty phase. McDowell argues Gillingham's closing argument was ineffective because he did not specifically state that the catch-all factor of California Penal Code Section 190.3(k) allowed the jury to consider any evidence of McDowell's background as mitigating circumstances.[6]

[22] Gillingham's choice not to specifically relate the evidence to the statutory factors was clearly a strategic choice. In his closing argument, Gillingham was not formalistic and did not use a mathematical approach in arguing how the jury should analyze and balance the aggravating factors and mitigating circumstances. Instead, he spoke to the jury in laypersons' terms and pleaded mercy for McDowell. Gillingham reminded the jury of the magnitude of their decision and asked the jury not to be vengeful by substituting one death for another. He explained that he was amazed that the victim's husband could come to court and testify without rage, hate, or anger and impliedly asked the same from the jurors. He also gave statistics on the death penalty and argued that the killing of one person "does not necessarily stop killing by another person." Finally, he referred to McDowell's abusive childhood background and asserted that "McDowell is like cast from a mold, or having lived in a vice, and the clamp marks are there and they were created basically in the image and likeness of his father."

[6]As instructed by the state trial court, this statutory catch-all factor provided that the jury could consider in mitigation any evidence of McDowell's "character or personal history" which "extenuates the gravity of the crime." *See* Cal. Pen. Code 190.3(k).

[23] Faulting Gillingham for failing to link the mitigating evidence to specific statutory factors "would probably narrow the boundaries of acceptable argument style too much." *Hendricks*, 70 F.3d at 1045. Gillingham was not constitutionally required to specifically tell the jury they could consider the mitigating evidence under section 190.3(k). The trial court told them this in its instructions. *See supra.*

E. Prosecutorial Misconduct

McDowell argues the prosecutor committed prosecutorial misconduct by (1) arguing that the absence of particular mitigating circumstances constituted aggravating factors, (2) arguing that the presence of Rodriguez's two-year old child in the house at the time of the murder constituted an aggravating factor, (3) commenting on McDowell's demeanor during trial, and (4) eliciting inadmissible testimony. We reject these arguments.

1. Absence of Mitigating Circumstances

During closing arguments in the penalty phase, the prosecutor argued that the jury could consider the absence of evidence applicable to mitigating factors (d) and (h) under California Penal Code Section 190.3 as evidence of aggravation. Factor (d) provides that, in reaching its sentencing decision, the jury may consider: "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Factor (h) provides that the jury may consider: "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication."

During closing argument, the prosecutor made the following statements:

> Another category or factor that you can consider and then give the appropriate weight to is . . . "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."
>
> I submit to you that there is absolutely no evidence Mr. McDowell was under the influence of extreme mental or emotional disturbance.
>
> It is People's contention that the fact that there was no influence of a strain, mental or emotional disturbance, is a factor in aggravation, and you should give it the proper weight.
>
> . . .
>
> [With respect to factor (h)], [w]ell if Mr. McDowell was able to do it, what he did, . . . with no evidence of intoxication . . . then you know that it didn't exist.
>
> And I submit to you that this is a factor in aggravation because it tells you the degree to which Mr. McDowell planned out and foresaw and designed a scheme to meet his sexual urgings on May 20th, 1992.

[24] The prosecutor properly could have argued that there was no evidence of mental impairment or intoxication and the jury could consider this lack of evidence. *Cf. Tuilaepa v. California*, 114 S. Ct. 2630, 2637-39 (1994). The prosecutor could not argue, however, that under California law this lack of evidence constituted a positive aggravating factor. *See People v. Davenport*, 710 P.2d 861 (Cal. 1985).

[25] Nevertheless, in the present case, the California Supreme Court determined any error was harmless.

*McDowell*, 763 P.2d at 1281. We agree with the California Supreme Court: there is not a reasonable possibility that the argument affected the verdict. Both Gillingham and the state trial court guarded against this.

During his closing argument, Gillingham told the jury the prosecutor had improperly converted a mitigating factor into an aggravating factor. He also told the jury they could not consider the absence of a mitigating factor as an aggravating factor. Even the prosecutor stressed to the jury that they were not simply to add up the number of aggravating and mitigating factors to determine the appropriate sentence, and the state trial court instructed the jury that they were to give whatever weight to the factors they deemed appropriate and that one mitigating circumstance could outweigh several aggravating circumstances.[7]

2. Presence of Rodriguez's Child

McDowell also asserts the prosecutor improperly argued during his closing argument in the penalty phase that McDowell chose Rodriguez as a victim because her child was present at the Bardsley home at the time of the rape and murder. McDowell contends there was no evidence that he knew Rodriguez had a child or that the child would be present at the time of the rape and murder.

An improper comment made by a prosecutor does not violate a defendant's constitutional rights unless the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Turner v. Marshall*, 63 F.3d 807, 817-18 (9th Cir. 1995) (internal quotations and citation omitted).

[7]We assume only for the purpose of this analysis that it could be an error of federal constitutional dimension for the prosecutor to argue that the absence of a mitigating factor can be considered by the jury as an aggravating factor in a capital case. We do not decide this question, however, and express no opinion on it.

The prosecutor's comment did not violate McDowell's due process rights. The comment was a single comment made in the context of other appropriate argument. Moreover, the jury was aware Rodriguez's child was far removed from the scene of the murder and, as asserted by McDowell, there was no evidence McDowell chose his victim because a child was present. It is highly unlikely, particularly in light of the other overwhelming aggravating evidence, that this argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

3. Comments on McDowell's Demeanor and Tactics

McDowell argues that the prosecutor, during his closing argument in the penalty phase, improperly commented on McDowell's demeanor and implied McDowell's mother should not be permitted to plead for his life. The prosecutor likened McDowell to a lion, placid only while caged, and stated that he was well behaved during trial because his fate was being determined. The prosecutor also stated that McDowell had the right to present his mother's plea for his life, but then stated that McDowell did not allow anyone to plead for Rodriguez's life.

Even if arguably inflammatory, these statements did not render McDowell's sentencing phase fundamentally unfair. By making the lion comment the prosecution merely asked the jury not to rely on McDowell's passive behavior during trial. With regard to the comment pertaining to McDowell's mother, the prosecutor did not state that the jury could not consider the mother's plea. The prosecutor simply asked the jury not to overlook the victim and not to make its sentencing decision based solely on sympathy for McDowell.

4. Inadmissible Testimony

Finally, McDowell argues the prosecutor committed misconduct during the penalty phase by eliciting inadmissible tes-

timony from Patricia H., an earlier rape victim. Patricia H. testified that, on the day of her rape, McDowell asked her for a glass of tea and asked that she wrap a paper towel around the glass. She testified she asked McDowell if he wanted the towel around the glass "so they can't find your fingerprints." The prosecutor then wanted to ask Patricia H. what McDowell's answer was. This prompted a sidebar conference at which the state trial court ruled Patricia H. could not testify, in response to the prosecutor's question "What did Mr. McDowell say?", that McDowell said he had served enough time in prison. The prosecutor explained that he had told Patricia H. she was not to say that.

The prosecutor then asked Patricia H., "What did Mr. McDowell say?" Patricia H. answered "He said, yes, he'd done enough time. He knew all the tricks." The defense objected and the prosecutor explained that he had instructed the witness to testify only that McDowell stated "I know all the tricks."

The district court found that the prosecutor did not commit misconduct. He had instructed Patricia H. not to say that McDowell had served time in prison, but she ignored or misunderstood the instruction. We agree with the district court. The prosecutor did not commit misconduct.

F. Admission of Conduct Underlying Child Molestation and Patricia H.'s Rape

McDowell argues that the introduction, during the penalty phase, of the facts underlying his prior conviction by guilty plea to lewd and lascivious conduct (as a result of a charge of child molestation) and the unadjudicated rape of Patricia H. rendered his sentence fundamentally unfair. We disagree.

[26] The introduction of this conduct during the penalty phase of a capital case does not necessarily violate a defendant's rights under the Eighth or Fourteenth Amendments or

render a death sentence unreliable. *See Williams v. Lynaugh*, 814 F.2d 205, 207-08 (5th Cir.), *cert. denied*, 484 U.S. 935 (1987); *Hatch v. State*, 58 F.3d 1447, 1465-66 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1881 (1996); *Devier v. Zant*, 3 F.3d 1445, 1464-65 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 1125 (1995). A sentencer may rely on criminal conduct not resulting in a conviction if the evidence has "some minimal indicium of reliability beyond mere allegation." *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984); *see also United States v. Hull*, 792 F.2d 941, 942-43 (9th Cir. 1986); *Williams v. New York*, 337 U.S. 241, 247 (1949).

[27] The evidence of the child molestation was sufficiently reliable. As a consequence of the child molestation charge, McDowell was actually convicted of lewd and lascivious conduct by his guilty plea to that offense. With regard to the rape of Patricia H., although McDowell was not convicted of that offense, an arrest warrant had been issued for his arrest on that charge. He had escaped arrest by fleeing the state of Florida where the rape occurred. That he was wanted for rape in Florida was confirmed by McDowell when he stated at the time of his arrest following the murder: "I'm wanted for rape in Florida." *See supra*.

[28] Further, McDowell's counsel had the opportunity to and did cross-examine the witnesses to test the reliability of their testimony. Curtis M., the victim of the child molestation offense, and his mother testified. To the extent McDowell argues that Curtis M. lied to experts in his deposition that was taken shortly after the molestation, McDowell's counsel had the opportunity to test his credibility during cross-examination. With regard to the rape offense, Patricia H. and her son who was present during her rape also testified.

[29] In addition, the state trial court instructed the jury that, before they could consider the evidence of the child molestation and rape offenses, they had to find beyond a reasonable doubt that McDowell had committed those crimes. *See People*

*v. Balderas*, 711 P.2d 480, 515-16 (Cal. 1985) (concluding prosecution must prove unadjudicated offenses beyond a reasonable doubt). In these circumstances, the introduction of the evidence of the child molestation and rape did not render the sentencing phase constitutionally unfair. *See Williams*, 814 F.2d at 207-08.

G. Extrinsic Evidence

McDowell argues the jury considered extrinsic matters in reaching its penalty decision. The district court rejected this argument because the only evidence submitted in support of it was a declaration which was inadmissible under Federal Rule of Evidence 606(b).

McDowell submitted the declaration of Connie Jackson Kimble, the holdout juror in McDowell's trial. In her declaration, Kimble stated that the other jurors were becoming increasingly impatient and angry with her. She also stated:

> One of the jurors . . . stated that I should vote for death because a sentence of life without parole would not mean that Mr. McDowell would not be paroled. The juror stressed that if we imposed a sentence of life without parole it wouldn't mean "without parole" and Mr. McDowell could be paroled in 10 or 15 years. The juror also stated that if I voted for death Mr. McDowell would not be executed, because no one was being executed in California. They stressed that if he were sentenced to death he would just remain in prison the rest of his life.

She then explained that because McDowell had suffered such a "horrible life," she believed he should not be executed; but she did not want him to be released from custody. She stated she voted for the death sentence because she thought that, notwithstanding the jury's verdict of death, McDowell would not be executed.

McDowell first argues that the district court erred by applying Federal Rule of Evidence 606(b) to decide the admissibility of Kimble's declaration. McDowell contends the district court should have applied California Evidence Code Section 1150(a). We disagree.

Federal Rule of Evidence 1101(c) provides that the Federal Rules of Evidence apply to habeas corpus petitions filed in federal court under 28 U.S.C. § 2254. Fed. R. Evid. 1101(e). Other Circuits have applied Rule 606(b), rather than state law, when determining whether evidence is admissible to impeach a state court verdict. *Bibbins v. Dalsheim*, 21 F.3d 13, 16-17 (2d Cir. 1994); *Stockton v. Commonwealth of Va.*, 852 F.2d 740, 743-44 (4th Cir. 1988); *Silagy v. Peters*, 905 F.2d 986, 1008-09 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991); *see also Bloom v. Vasquez*, 840 F. Supp. 1362, 1377 (C.D. Cal. 1993). Consistent with the approach taken by our sister circuits, we conclude the district court properly applied the federal law of Rule 606(b).

We also conclude the district court did not err by refusing to admit juror Kimble's declaration into evidence. Under Rule 606(b),* testimony regarding "extraneous influences" on the jury is admissible, but testimony regarding the deliberative process, the "motives of individual jurors and conduct during deliberations" is inadmissible. *United States v. Falsia*, 724

*Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Fed. R. Evid. 606(b).

F.2d 1339, 1343 (9th Cir. 1983); *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982). "The type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings and bias that every juror carries into the jury room." *Hard v. Burlington N.R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989).

The Seventh Circuit has concluded that identical proffered testimony regarding the consequences of a life or death sentence was inadmissible under Rule 606(b). *Silagy v. Peters*, 905 F.2d 986, 1008-09 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991). In *Silagy*, the court reasoned that admitting such evidence would authorize "constant attempts to undermine jury verdicts through the scrutiny of the juror's thoughts and deliberations." *Id.* at 1009.

Juror Kimble's declaration reflects her belief about the consequences of the sentence of death and her motive in voting for it. The district court did not err by excluding her declaration.

H. Cumulative Effect

Finally, McDowell argues that the cumulative effect of the alleged errors deprived him of due process.

[30] Although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial. *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975); *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983). That is not the case here. McDowell has not shown the cumulative effect of any alleged errors deprived him of due process.

AFFIRMED.

# Appendix D

DEATH PENALTY

JS-6

FILED
NOV 21 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| CHARLES E. MC DOWELL, JR., Petitioner, | ) | CASE NO. CV 90-4009 MRP |
| v. | ) | ORDER AND OPINION ON AMENDED PETITION FOR WRIT OF HABEAS CORPUS |
| ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent. | ) | |

ENTERED
CLERK U.S. DISTRICT COURT
NOV 21 1995
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

## I. INTRODUCTION

On May 7, 1993, Charles McDowell, Jr. ("petitioner"), filed an amended petition for writ of habeas corpus (the "petition") raising eleven claims of constitutional error which, he contends, require reversal of his 1984 conviction on one count of first-degree murder and his subsequent death sentence.[1] In deciding the merits of the petition, the Court has read the state

1. Petitioner filed his original petition for writ of habeas corpus in December 1990. In August 1991, after the Court authorized funds to investigate several claims, petitioner requested a stay of the federal proceedings in order to exhaust his claims in state court. Petitioner returned to federal court in July 1992.

court record, as well as all of the pleadings and exhibits filed in federal court. Further, in July 1994, the Court held a lengthy evidentiary hearing addressing petitioner's ineffective assistance of counsel claim.

The Court finds that none of petitioner's claims have merit and denies the amended petition for writ of habeas corpus.

## II. GUILT PHASE FACTS

### A. Prosecution Case

On May 20, 1982, Mrs. Paula Rodriguez ("Rodriguez") was working as a housecleaner at the residence of Frank and Linda Bardsley ("the Bardsleys). At the time, petitioner was living with Lea D'Crenza ("D'Crenza") in the house next door to the south of the Bardsley residence.

At about 1:00 p.m. that day, a number of neighbors heard the sounds of a woman screaming which were later described as "extremely loud" and "blood-curdling." Theodore and Dolores Sum (the "Sums"), the neighbors who lived next door to the north of the Bardsley residence, telephoned Rodriguez at the Bardsley residence to inquire about the screams. After hearing more screams through the telephone, the line was disconnected. The Sums went to the Bardsley residence to investigate. Mr. Sum arrived at the Bardsley house first. He opened the front door and called for Rodriguez. As he opened the door wider and stepped inside, he saw a nude man whom he later identified as petitioner. With a knife in hand, Petitioner lunged at Mr. Sum and slashed him across the neck. Mr. Sum pushed petitioner away; petitioner lost his balance and Mr. Sum ran out of the house, closing the door behind him. The Sums returned to their house and called the police. Petitioner was later seen running from the Bardsley residence into the D'Crenza residence, and thereafter seen walking south, away from the D'Crenza house, appearing disoriented.

The police arrived at the scene and went to the Bardsley residence. Inside, police found Rodriguez stabbed to death in the den area of the house. She was lying in a supine position with her skirt pulled up, her legs apart, her underpants cut, her blouse slashed, and her body covered with blood.[2] Seminal fluid was found on her underwear; cigarettes and a lighter were found near her body.[3] There was blood around the front door area, the area where the body was found and on the telephone in the den.[4] Police found Rodriguez' two-year-old daughter unharmed in a stroller upstairs.

A police officer discovered one trail of blood leading toward the Sum residence, and another leading toward the D'Crenza residence. Circling each blood spot along the way, the officer followed the second trail, which lead into the D'Crenza residence, through the kitchen where a bloody knife was found,[5] into the bathroom where bloody shorts and bloody fingerprints were found, out of the house, and down the street a distance. As he circled the last blood spot, the officer heard a male voice yell, "Don't shcot me. Don't shoot me. I give up." At that location, police officers discovered petitioner, whose wrist and fingers were cut, in the bushes. Petitioner was then arrested and taken to the hospital for treatment of his cuts.

Officer Roger Michel ("Michel") accompanied petitioner to the hospital. Michel described petitioner's behavior at the hospital as loud and boisterous. Although Michel never questioned petitioner, petitioner repeatedly volunteered

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2. The coroner testified that Rodriguez suffered numerous stab wounds to the neck, chest, arm, and hands. Some of the wounds were defensive stab wounds, including one hand cut that went to the bone. Rodriguez also had a bruise on one thigh and a scratch on the other thigh.

3. Neither Rodriguez nor the Bardsleys smoked cigarettes or carried a lighter. The cigarettes were the brand smoked by petitioner.

4. All blood samples taken from the house, from petitioner and from Rodriguez were consistent with either petitioner's or Rodriguez' blood type.

5. The bloody knife was identified as belonging to a set of knives owned by petitioner's roommate, D'Crenza.

information -- telling Michel, among other things, that the previous night he had watched a movie in which a woman was strangled, raped, and stabbed, and that the movie created "a force" that made him go next door and "hurt" the woman there. Petitioner volunteered that the blood on his hands was his own, but that the blood on his shorts and stomach belonged to Rodriguez. He also stated that he "hurt" Rodriguez because his roommate (D'Crenza) did not appreciate petitioner's work on the house they shared. Petitioner cried often at the hospital and repeatedly stated that he had not intended to harm Rodriquez.

Glenn Smith a Paramedic trained to recognize symptoms of alcohol and drug intoxication, testified that when he transported petitioner to the hospital, he did not see any evidence that petitioner was under the influence of alcohol or drugs.

B. Defense Case

The defense made no opening statement and presented no witnesses. In closing argument, the defense conceded every crime charged, including first degree murder under a felony-murder theory. Defense counsel argued, however, that there was no evidence that petitioner intended to kill Rodriguez. Asserting that petitioner intended only to rape Rodriguez, but not to kill her, defense counsel urged the jury to find the special circumstance allegations untrue.[6]

C. Jury Verdict

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6. Petitioner's case was tried after the California Supreme Court held in Carlos v. Superior Court, 35 Cal. 3d 131, 197 Cal. Rptr. 79, 672 P.2d 436 (1983), that a jury must find that a defendant had an "intent to kill" before it could find a felony murder special circumstance to be true. The trial also occurred before People v. Anderson, 43 Cal. 3d 1104, 240 Cal. Rptr. 585, 742 P.2d 1306 (1987), overruled the decision in Carlos. The parties have proceeded as if Carlos controls.

After two days of deliberation, the jury returned its verdict, finding petitioner guilty of first degree murder during an attempted rape; attempted murder with the use of a deadly weapon and with the infliction of great bodily injury; attempted rape with the use of a deadly weapon; and burglary with the use of a deadly weapon. The jury also found true the two special circumstances: burglary felony murder and rape felony murder.

## II. PENALTY PHASE FACTS

### A. Conflict between Petitioner and His Trial Counsel

The transcripts contain a number of references to a conflict between petitioner and his trial counsel, Howard Gillingham ("Gillingham"), regarding the way in which to conduct the penalty phase of the trial. After the verdict, but prior to the penalty phase, Gillingham informed the court that he and petitioner disagreed about how to address the prosecution's aggravating evidence. Petitioner's family members had not yet arrived in California but were scheduled to arrive shortly thereafter; Gillingham requested a recess to discuss the matter further with petitioner and his family.

Later, during the prosecution's case, the court held a meeting with Gillingham and petitioner. Gillingham once again reported that he and petitioner disagreed about the manner in which to conduct the penalty phase -- Gillingham was prepared to present witnesses, but petitioner stated that he wanted no witnesses and no statements, and that he particularly did not want his family involved. The court rejected petitioner's motion to represent himself.

At the beginning of the defense presentation, Gillingham informed the court that petitioner would be requesting to be excused during the testimony as he continued to oppose any testimony from members of his family. Petitioner's request was denied. Later, during the middle of the defense presentation, a brief discussion took place regarding shackling petitioner because of his agitation about the testimony of his family.

B. Prosecution Case

At the penalty phase, the prosecution presented evidence of two prior crimes committed by petitioner: a felony conviction of lewd and lascivious conduct, and an uncharged and unadjudicated rape. Eleven-year-old Curtis M. testified to the first incident, which occurred in February 1977 when he was four years old. Petitioner, then a family friend living in the same trailer park, offered Curtis M. a quarter if the young boy would do what petitioner requested. The boy accepted the offer, and petitioner instructed him to remove his clothing and lie on the bed. After removing his own clothes, petitioner then orally copulated the boy, ordered the boy to do the same to him, and finally inserted his penis into the boy's rectum. Curtis M.'s mother testified to the same facts, which she had learned from her son upon discovering that his rectum was red and sore after the incident.[7]

The victim of petitioner's second prior sex crime, Mrs. Patricia H., testified that, one evening in 1981 while she was home alone with her six-year-old son (Paul H.), petitioner came to her door wearing nothing other than shoes and socks. Petitioner told Patricia H. that he had been mugged. He requested a towel to cover himself and to use the phone to report the mugging to the police. Patricia H. initially allowed petitioner to sit inside the house as he waited for the police to arrive. When he began attempting to kiss her and expressed a desire to have sex with her, however, she asked him to leave the house and he did so. After waiting for a period of time, Patricia H. left the house with her son in an attempt to flee by car. However, outside the house, petitioner again assailed her and

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7. Petitioner was arrested and charged with involuntary sexual battery after this incident. As part of a plea bargain, he pleaded guilty to committing a "lewd, lascivious and indecent assault or act upon a child."

After hearing from both the prosecution and the defense, the court ruled that the testimony about the facts of the incident would be admissible, but petitioner's resultant guilty plea to lewd and lascivious conduct would not be.

threatened to kill her. He forced the two to return to the house, threatening to sodomize and kill Patricia H.'s son if she did not send him to the other room and make him stop crying.

Patricia H. testified further that petitioner forced her to copulate him orally, then raped and sodomized her. Afterwards, he shaved her pubic hair, raped her again, and inserted the razor blade into her rectum. She finally escaped when petitioner directed her to go outside and send away her brother-in-law, who had just arrived. Once outside, she and her brother-in-law broke a window, pulled her son to safety, and escaped together.

A sheriff who investigated the incident found petitioner's wallet and identification in a tent behind the house where petitioner had apparently been living. After this incident, petitioner was not found until he was arrested for the Rodriquez murder.

C. Defense Case

The penalty defense consisted primarily of family members who testified that, as a child, petitioner suffered brutal abuse at the hands of his father, Charles McDowell, Sr. ("McDowell Sr."), who was described as a "religious fanatic" with a terrible temper. A maternal uncle testified that petitioner was a mistreated and unwanted child; he recalled seeing McDowell Sr. kick petitioner across the room while petitioner was still a baby and regularly saw him punch petitioner with his fists. Another maternal uncle testified that McDowell Sr. frequently whipped and beat petitioner and his siblings; that at least one child would be severely beaten at each meal; and that the children were often beaten as punishment for falling asleep or becoming restless as McDowell Sr. read to the family each night.

Petitioner's younger brother, Thomas McDowell ("Thomas"), described his family life as "rough," testifying also that his father frequently whipped all of the children, especially petitioner. Thomas described in detail incidents of physical abuse inflicted on himself and his siblings by McDowell Sr. Thomas also reported that one of his sisters had been repeatedly sexually abused by McDowell Sr. Thomas further

testified that another sister was killed after being struck by car and that McDowell Sr. blamed petitioner for the girl's death.

Petitioner's mother, Shirley McDowell ("Mrs. McDowell"), testified that she married McDowell Sr. in 1952 at the age of sixteen, and became pregnant with petitioner, the oldest of her six children, shortly thereafter. McDowell Sr. began physically abusing Mrs. McDowell within two months of their marriage, and continued to physically abuse her throughout their marriage, which ended in divorce in 1975. Mrs. McDowell testified that, beginning when petitioner was three weeks old, McDowell Sr. beat petitioner on a daily basis. She also recounted some of the same incidents of abuse to which previous witnesses had testified. She testified to other abuses as well; for example, McDowell Sr. punished petitioner for being a chronic bedwetter by beating him, rubbing his nose in the wet bed, and once pinching his penis so hard that surgery was required to treat the resulting injury. Another time, as punishment for setting a dog house on fire, McDowell Sr. held petitioner and his brother naked over the flames of the fire. Mrs. McDowell also testified that McDowell Sr. had an incestuous relationship with one of petitioner's sisters, yet often jealously accused his sons of having sex with her. Finally, Mrs. McDowell stated that she would not allow petitioner to kiss her when he was a teenager because she had been told that he was a homosexual.

Bonnie Haynes, who was a neighbor of the McDowell family when petitioner was a child, testified that McDowell Sr. was overly strict and rough, and that she often noticed the McDowell children appeared bruised and beaten when she saw them. Haynes further testified that even though the McDowell children often admitted to having been beaten by McDowell Sr., they nevertheless frequently professed love for their father and boasted about him.

The defense also presented the testimony of a registered nurse who was petitioner's primary therapist when he was in the Mentally Disordered Sex Offender Program at Florida State Hospital after the Curtis M. incident. The nurse testified that she had known petitioner for twenty-one months, that he was

not a troublesome patient and that he had appeared to have a sincere desire to obtain help at that time. The probation officer who supervised petitioner following the Curtis M. incident testified that petitioner voluntarily lived with his father during the year he was on probation, and, moreover, that when she sent petitioner for a psychiatric evaluation at that time, the evaluator concluded that petitioner was not in need of further treatment.

Gillingham did not present the testimony of Dr. William Vicary ("Dr. Vicary"), the expert forensic psychiatrist Gillingham had originally planned to call to the witness stand as a mental health expert, for fear that the contents of a damaging psychiatric report would be introduced through him.[8]

D. Rebuttal

The prosecution pleaded unsuccessfully for a short continuance to call in rebuttal a psychiatrist to define the terms "mentally disordered sex offender" and "sociopath," and to testify about the relationship between child abuse and adult behavior. The prosecution ultimately presented no rebuttal witnesses.

E. Jury Decision

The jury deliberated two-and-one-half days before returning a verdict of death.[9]

## IV. CLAIMS RAISED IN PETITION

A. WHETHER PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/SPECIAL

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8. Gillingham's decision not to use Dr. Vicary as a witness is discussed below.

9. A jury note sent during deliberations is discussed below.

CIRCUMSTANCE AND PENALTY PHASES OF TRIAL

In Strickland v. Washington, 466 U.S. 668 -(1984), the Supreme Court recognized that the right to counsel found in the Sixth Amendment to the United States Constitution "'is the right to effective assistance of counsel,'" id. 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)), and set forth the legal standard for establishing ineffective assistance of counsel under the Sixth Amendment. Under the Strickland standard, a criminal defendant claiming ineffective assistance of counsel must establish both that counsel's actions were deficient, and that his defense was actually prejudiced by the deficient performance. Strickland, 466 U.S. at 687.

With respect to deficiency in the quality of representation, the relevant standard is "simply reasonableness under prevailing professional norms," considering all the circumstances. Strickland, 466 U.S. at 688. The Court cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential," because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was Unreasonable." Id. at 689. The Court then set out the following guidelines for evaluating the effectiveness of counsel's assistance to defendant:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be

considered sound trial strategy." See Michel v. Louisiana [350 U.S. 91, 101 (1955).]

. . .

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 689-90.

With respect to actual prejudice, the Court made clear that even a finding that counsel committed an error reflecting a lack of reasonable professional judgment "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Court explained that a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id.

Defining the inquiries a court must make in evaluating claims of ineffective assistance of counsel such as petitioner's, the Strickland Court stated that

When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the

> extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

Id. at 695.

These are the standards the Court now applies in evaluating petitioner's ineffective assistance of counsel claims.

1. Guilt Phase--Gillingham's Failure to Present Evidence Supporting a Mental State Defense

Petitioner's claim of ineffective assistance of counsel at the guilt phase of the trial is based primarily upon Gillingham's failure to present evidence supporting a mental state defense. Petitioner claims that Gillingham's assistance was ineffective because he neglected to investigate and present evidence supporting the claim that petitioner did not actually form the intent to kill Rodriguez, which evidence included: (1) petitioner's consumption of drugs, including LSD and alcohol, on the day of the murder.[10/] (2) petitioner's Post-Traumatic Stress

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10. Petitioner allegedly told Gillingham repeatedly that he ingested large quantities of drugs on the day of the murder. Gillingham, however, ceased looking at intoxication as a defense when blood and urine tests conducted by the Los Angeles Police Department and two independent laboratories detected nothing more than an insignificant blood-alcohol level of .01, trace amounts of marijuana, and no other drugs. (See Exs. 217, 348, 350; see also infra n.20.)

Petitioner contends that Gillingham should have known that LSD testing was unreliable, and that he should also have inquired into the storage and handling of the specimens and obtained the services of an expert toxicologist or criminalist to learn the reliability of a negative test result. Petitioner also faults Gillingham for his failure to locate any witnesses who saw petitioner ingesting drugs on the day of the murder; i.e., "Andy," a drug dealer whom petitioner allegedly described in detail and suggested locations where he might be found.

Disorder;[11] and (3) petitioner's chronic substance abuse.[12] Petitioner concludes that as a result of Gillingham's alleged failure to pursue these avenues of investigation, he was deprived of the defense that the conditions, either singularly or in combination with one another, raised a reasonable doubt as to whether petitioner actually formed the intent to kill Rodriguez.[13]

Because the diminished capacity defense had already been abolished, under the laws in existence at the time petitioner killed Rodriguez, petitioner could use evidence of voluntary intoxication or an impaired mental state only to show that he did not actually form the required specific intent to kill. See Cal. Penal Code § 22.[14] 28[15] He could not, however,

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11. Petitioner argues that Gillingham failed to investigate and present evidence that petitioner's childhood was marred by severe and sustained physical, sexual, and psychological abuse, which led to the failure to obtain expert testimony that petitioner's experiences caused him to suffer from Post-Traumatic Stress Disorder.

12. Petitioner faults Gillingham's failure to locate witnesses who knew that petitioner used alcohol and drugs on a daily basis and had done so for months prior to the murder, or who could document petitioner's abuse of alcohol and drugs since childhood. Petitioner also challenges Gillingham's failure to obtain the services of an expert who could testify that petitioner suffered from chronic substance abuse disorders which are set forth in the American Psychiatric Association's Diagnostic and Statistical Manual, III ("DSM-III").

13. Habeas counsel generally focus upon evidence relating to the defense that petitioner did not actually form the intent to kill Rodriguez. On occasion, however, habeas counsel have mistakenly highlighted evidence addressing petitioner's alleged "capacity" to form the requisite mental state. A claim of ineffective assistance of counsel cannot, in this case, be premised on the theory that trial counsel failed to develop evidence supporting a defense of "diminished capacity." At the time of petitioner's crimes, the California Legislature had abolished the defense of diminished capacity. People v. Saille, 54 Cal. 3d 1103, 1111-12, 2 Cal. Rptr. 2d 364, 820 P.2d 588 (1991); Cal. Penal Code § 28(b).

14. At the time petitioner committed his crime, California Penal Code § 22 provided in pertinent part:

use such evidence to demonstrate that he lacked the capacity to form the mental state. See id. The same rules govern testimony by mental health experts. Petitioner could not have introduced expert testimony addressing whether he was capable of forming the required mental state for the crimes with which he was charged. See Cal. Penal Code § 29.[16]

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> (a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge or malice aforethought, with which the accused committed the act.
>
> (b) Whenever the actual existence of any mental state, including but not limited to, purpose,intent, knowledge, or malice aforethought, is a necessary element to constitute any particular species or degree of crime, evidence that the accused was voluntarily intoxicated at the time of the commission of the crime is admissible on the issue as to whether the defendant actually formed any such mental state.

Cal. Penal Code § 22.

15. California Penal Code § 28 provides in pertinent part:

(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent,knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

Cal. Penal Code § 28.

16. California Penal Code § 29 provides:

In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states,

Thus, in order to demonstrate prejudice resulting from Gillingham's alleged failures, petitioner must prove: (1) that at the time of the murder, he (a) was intoxicated from alcohol, drugs, or some combination of the two or (b) was suffering from an impaired mental state; and (2) that he did not actually form the requisite mental intent. Having considered the state court record and all of the evidence presented at the evidentiary hearing, the Court concludes that petitioner has not established either element such that there is a reasonable probability that the outcome of the guilt phase would have been different had evidence of petitioner's alleged intoxication or impaired mental state been presented.

a. Petitioner's Intoxication on the Day of the Murder

Petitioner contends that Gillingham unreasonably failed to pursue investigative leads that would have uncovered evidence establishing his intoxication at the time of the crime. Petitioner has no objective proof that he was intoxicated[17] at the time he murdered Rodriguez. Laboratory testing of his blood and urine samples revealed an insignificant blood alcohol level of .01, trace levels of marijuana metabolite, and the absence of barbiturates and LSD. (Exs. 278, 314, 347, 349.) Petitioner now suggests, however, that those tests results were erroneous due to delayed testing and faulty storage by the Los Angeles Police Department ("LAPD").[18] Petitioner also

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which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

Cal. Penal Code § 29.

17. Throughout this Order and Opinion, the Court's discussion of petitioner's intoxication refers to intoxication induced by both alcohol and drugs.

18. Because the Court concludes that petitioner's intoxication claim is

contends that Gillingham unreasonably failed to present testimony by lay witnesses who could have corroborated petitioner's intoxication on the morning of the crimes.

i. Laboratory Testing

Petitioner has not established that Gillingham failed to act reasonably in securing scientific testing of the blood and urine samples. Gillingham encountered an unavoidable delay in securing the samples when the LAPD would not release them until it had completed its own testing.[19] By the time Gillingham sent the samples for independent testing, he knew that few laboratories screened for LSD and that, when LSD testing was performed, the results were not reliable. Gillingham nonetheless secured test results from two additional independent

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without merit, the Court declines to address the adequacy of the storage of petitioner's blood and urine samples.

19. The LAPD laboratory results did not support a defense based on intoxication.

laboratories.[20] Neither uncovered results which would have

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20. Gillingham was aware of the need for alcohol and drug toxicology screening and attempted to get the test results from the LAPD. See Exhibit 221 (handwritten note from Butler to Gillingham dated 2/23/83 noting that the defense still needed any reports of petitioner's blood or urine analysis); Exhibit 510 (letter dated 3/9/83 from Gillingham to prosecutor requesting any reports, written statements, or documents relating to the drawing or analysis of petitioner's blood and urine samples); Exhibit 220 (4/4/83 letter from Gillingham to prosecutor asking that petitioner's blood and urine samples be tested for alcohol and any hallucinogenic or narcotic substances, including LSD, MDA, marijuana, and phencyclidine); Exhibit 218 (5/16/83 letter from prosecutor to Gillingham indicating that he was in the process of obtaining lab tests on petitioner's blood); Exhibit 91 (letter dated 6/9/83 from Gillingham to Drs. Vicary and Maloney stating "Believe it or not I am still waiting for the results of the alcohol and drug testing from the prosecution"); Exhibit 216 (6/10/83 note to file regarding asking prosecutor for toxicology report). It appears that the LAPD would not release samples to the defense until the prosecution had completed its testing. Therefore, the most Gillingham could do was to remind the prosecution that he needed to complete his own testing, which is precisely what Gillingham did.

Gillingham finally obtained the LAPD drug and alcohol screening results on June 14, 1983. (Exhibits 217, 219.) At that time, Gillingham began exploring the possibility of having the samples independently tested. See Exhibit 304 (6/14/83 note that Biotechnics can test for marijuana if it was present in great quantity); Exhibit 307 (6/14 note recording that Dr. Naresch Jane said the LAPD would not hide the results if it found drugs or alcohol in the testing; also that he does not test for LSD and doubts any LSD would be found because of the difficulty in detecting it and the small amount of LSD required to induce hallucination); Exhibit 308 (undated notation that even if LSD is tested for, it cannot be proven; once LSD is in the blood/urine it is too diluted); Exhibit 310 (6/14 note stating that Bioscience tests for many drugs but not MDA and LSD); Exhibit 226 (7/1/83 note regarding Rancho Los Amigos Toxicology Laboratory stating that LSD testing is unspecific); Exhibit 295 (June 1983 note stating that the director of Western Labs said in a telephone conversation that LSD testing is almost impossible and is unreliable); Exhibit 297 (undated note that Smith Kline does alcohol testing, but does not normally do MDA; also, that the laboratory never does LSD testing and thought nobody did).

On July 1, 1983, Gillingham wrote to Western Laboratories confirming that the laboratory would be testing petitioner's May 20, 1982 blood and urine samples for MDA, PCP, marijuana, and alcohol, as well as any other drugs. (Exhibit 279.) On July 12, 1983, Gillingham had Western

aided the defense case.

While an attorney "must . . . provide factual support for [the] defense where such corroboration is available[,] . . . the duty to investigate and prepare a defense is not limitless." United States v. Tucker, 716 F.2d 576, 594, 584 (9th Cir. 1983). Based on his conversations with a number of laboratories regarding the state of LSD testing in 1983, having received negative test results from the LAPD and two independent laboratories, Gillingham's decision not to pursue further testing was both understandable and reasonable. Morgan v. Bunnell, 24 F.3d 49, 52 (9th Cir. 1994). His investigative efforts were well within the broad range of presumptively acceptable conduct by hiring two independent laboratories to investigate potential intoxication defenses and then relying on their shared, unqualified conclusion that there was no scientific basis for an intoxication defense. As to the LAPD's method of storing the samples, Gillingham has admitted that he had no basis for questioning its storage or handling of the samples. Gillingham's investigation into scientific testing of the blood and urine samples was not constitutionally deficient.

Nor has petitioner demonstrated prejudice. Petitioner is not entitled to habeas relief merely on a showing that delayed testing or improper storage could have resulted in degradation

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Laboratories and the Center for Human Toxicology appointed as toxicology experts. (Exhibit 281.) Testing later that month revealed no alcohol, no cannabinoids, no common narcotics, no antihistamines, no phenothiazines, no analgesics, no benzodiazepines, no antidepressants, no sedatives, no stimulants, and no other organic bases in petitioner's urine. (Exhibit 278.)

On July 19, 1983, Gillingham wrote to the Center for Human Toxicology confirming that the laboratory would perform confirming tests on petitioner's urine and blood if Western Laboratories found marijuana present, and the laboratory would also screen petitioner's urine for LSD. (Exhibit 282.) In October 1983, testing of petitioner's blood and urine at the Center for Human Toxicology revealed no LSD in either blood or urine, trace tetrahydrocannabinol ("THC") metabolites in urine, no THC in blood. (Exhibit 314.) Notes dated October 17 regarding a telephone call with the director of the Center for Human Toxicology state that the THC results suggest marijuana was used days before the sample was obtained, not hours before. (Exhibit 315.)

of drugs in blood and urine samples. Rather, petitioner must demonstrate that counsel' mishandling of the laboratory testing undermines confidence in the jury's implicit finding that petitioner intended to kill Rodriguez. Thus he must establish by a preponderance of the evidence that were it not for delayed testing or improper storage, there is a reasonable probability that the jury would have found that petitioner was so intoxicated at the time of the killing that there is a reasonable doubt as to whether he actually formed the intent to kill Rodriguez.[21/] Petitioner has failed to make this showing. The Court is not convinced that there is a reasonable probability that testing under different conditions would have yielded in different test results; nor is the Court convinced that, with those test results, it is reasonably probable that the jury would have been persuaded to find that petitioner was intoxicated at the time of the killing. Finally, the Court finds that, even if the jury found that petitioner was intoxicated, petitioner has failed to demonstrate that there is a reasonable probability that the jury would have found that he was so intoxicated that he did not actually form the intent to kill Rodriguez. The Court finds that Gillingham's treatment of the scientific testing did not result in the loss of evidence supporting diminished actuality defense under a theory of intoxication.

ii. Potential Testimony from Petitioner

Petitioner reported his alcohol and drug use on the day of the murder to numerous persons, telling a fairly consistent story each time. During a pretrial interview, for example,

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21. Petitioner would also have to demonstrate a reasonable probability that the jury would have found that petitioner did not actually form the requisite intent for a first degree murder conviction and the related special circumstances. Petitioner's burden was obviously the same at trial. Petitioner had only negative test results, however, and in order to assert a diminished actuality defense, he would need to prove his intoxication by other means and also to explain why the test results were negative despite his alleged intoxication.

petitioner told Dr. Vicary that on the morning of the murder, he drank two half-gallons of wine and a half-quart of liqueur, took three "hits" of LSD and three "matchsticks" of MDA (a mixture of an upper, a downer, and hallucinogenic), and smoked a "Sherman cigarette."[22] (Ex. 100.)

On March 17, 1983, petitioner told Marilyn Butler ("Butler") Gillingham's co-counsel until April 1984, that on the morning of the murder, he injected himself with a mixture of two "knives" of MDA and three "hits" of LSD while "Andy" and two other men were in another room at the D'Crenza residence, smoked a "Sherman cigarette" laced with PCP and drank alcohol while using the drugs. (Ex. 140.) On March 21, 1983, petitioner again discussed with Butler his drug usage the morning of the murder, repeating much the same story, stating this time that Andy supplied three "hits" of LSD and two grams of MDA when he came to petitioner's house that morning with the two other men. (Ex. 141.)

On March 31, 1983, petitioner reported to Dr. Norman Murphy ("Murphy"), a psychologist appointed as an expert to help Gillingham prepare petitioner's defense, that on the morning of the murder he began drinking around 7:00 a.m. and ultimately drank a gallon of wine and half of a fifth of liqueur, and that he also took marijuana, MDA, and LSD. (Ex. 229.) On April 1, 1983, Murphy again questioned petitioner about his alcohol and drug intake the morning of the murder and petitioner reported that he smoked one-and-one-half high potency marijuana cigarettes at about 6:30 a.m.; that when Andy

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22. Dr. Vicary later opined that petitioner was intoxicated, frustrated, and enraged at the time of the offense, but noted that there was insufficient evidence of drug or alcohol intoxication. (Ex. 104.) Dr. Vicary also testified at the evidentiary hearing that after reviewing the results of the alcohol and drug screening, he had doubts about the credibility of petitioner's account of his alcohol and drug intake on the day of the murder. (Evid. Hrg. Tr. 373, 378.)

arrived shortly thereafter with one hundred "hits" of LSD and some MDA, petitioner traded six "hits" of LSD for a one-eighth to one-fourth gram of MDA, then took both LSD and MDA; and that after Andy left (at around 9:00 a.m.), he drank wine and liqueur.

As documented above, petitioner's story regarding his alcohol and drug intake on the morning of the murder was fairly consistent when he was questioned about it at different times. But this testimony could only have been elicited from petitioner himself. An undated note from Gillingham's file indicates that Gillingham considered this option and decided not to have petitioner to testify for the following reasons:

--do not think he will appear sick
--he will cry which, though sympathetic to some, repulses others
--he is [ illegible ] and may get played against Vicary as havinq manipulated all of us

(Ex. 265.)

Thus, Gillingham's note indicates that he considered having petitioner testify, but believed that doing so would be a strategic error. In light of Gillingham's clearly expressed concerns at the time, the Court cannot find that failing to call petitioner as a witness was professionally unreasonable.

iii. Testimony of Supporting Witnesses

1) "Andy"

Petitioner contends that Gillingham erred in not locating "Andy," the drug dealer/friend who allegedly spent the morning of the murder taking drugs with petitioner at the D'Crenza residence. The evidence, however, shows that Gillingham was aware of Andy's existence and initiated a diligent search for him, though his efforts were ultimately unsuccessful. [23] Despite

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23. See Exs. 140, 141 (notes of Butler's interviews with petitioner during which he describes Andy and the places he usually frequented); Ex. 340 (4/12/83 note containing Andy's description and usual haunts); Ex. 255

Gillingham's efforts, Andy was never located. Gillingham testified at the hearing before this Court that he cannot now remember why he stopped the search. In the absence of evidence to the contrary, the Court concludes that it is likely that Gillingham ended the search because his investigators had exhausted their leads. The Court thus finds that Gillingham's failure to continue the search for Andy, after making a diligent effort to find him, was reasonable under the circumstances.

In any event, Andy's value as a witness is questionable. Petitioner's friend Speare Primpas ("Primpas") described Andy to Gillingham as a "heroin addict" and an ex-convict. (Ex. 172.) Additionally, petitioner reported to Butler that although Andy knew that petitioner had taken LSD the morning of the murder, Andy did not know about the MDA. Petitioner further informed Butler that neither Andy nor the two men with him actually saw petitioner inject the MDA-LSD mixture because petitioner injected himself in the bathroom. (Ex.140.)

(2) Speare Primpas

Petitioner further contends that Gillingham erred in not calling Primpas as a witness to substantiate petitioner's intoxication. The Court finds that Primpas would not have made any significant contribution to an intoxication defense because his credibility was questionable and the probative value of his testimony was minimal.

Gillingham had two substantive contacts with Primpas prior to trial: a phone conversation on June 3, 1982 and a personal interview on July 18, 1983. (Exs. 166, 172.) During the

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(3/22/83 handwritten note to investigator Marvin Frost stating that Butler informed Frost of Andy's usual attire and the Primpas contact); Ex. 167 (4/8/83 letter from Frost notifying Gillingham that he spoke with Speare Primpas regarding Andy's whereabouts); Ex. 250 (hand-drawn map of Highland Avenue with Andy's name in the corner and his places of frequent marked on the map); Ex. 179 (6/23/83 note to the file from Gillingham stating that investigator Dennis Moses agreed to look for Andy if he was appointed); Ex. 180 (7/12/83 order appointing Dennis Moses as an investigator).

two separate interviews, Primpas contradicted himself on several key points.[24] For example, during the first interview, Primpas informed Gillingham that he had known petitioner for six months prior to the murder. At the 13 second interview, however, he told Gillingham that they had been acquainted for almost one-and-one-half years. In addition, Primpas initially said he had not seen petitioner for two-and-one-half months prior to the murder, but later told Gillingham that he had seen petitioner only one-and-one-half weeks earlier.[25] Finally, at the first interview, Primpas reported that when he saw petitioner in jail the night of the murder, petitioner told him only that he remembered seeing "the lady" in front of the house and talking to her with a knife in his hands. Primpas did not describe petitioner's physical appearance in jail, nor did he offer any other details about petitioner's conversation that night. In contrast, during his second interview with Gillingham, Primpas recalled that petitioner said he went to the Bardsley home to have sex with Rodriguez, then "gave the maid a hard time" before "stabbing her in the stomach." Primpas also reported that petitioner said he did not remember "being high."

Moreover, even setting aside the contradictions in the information Primpas provided, Primpas would have been a difficult witness to present to the jury as his interaction with petitioner revolved around taking drugs with him and playing pool at a gay bar. Given these problems, Gillingham may well have concluded that even if Primpas had some worthwhile information, he lacked credibility.

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24. In addition to contradicting himself with Gillingham, Primpas contradicted himself in an interview with Gillingham's investigator which took place prior to April 1983. In that interview, Primpas first said that he did not know Andy, but then later acknowledged that he did know him. (Ex. 167.)

25. Gillingham remarked on this discrepancy in his notes. Nonetheless, because Primpas had no contact with petitioner on the morning of the killing, under either version of Primpas' story, Primpas had no relevant testimony to provide regarding petitioner's level of intoxication in the hours immediately preceding the murder.

Even if Gillingham had called Primpas to testify, the information Primpas could have provided was of little significance. Most importantly, Primpas had no contact with petitioner in the relevant time period prior to the murder, and therefore could not have corroborated an intoxication theory. Additionally, the evidence demonstrates that Primpas never volunteered his description of petitioner on the night of the murder to anyone before he was contacted by petitioner's current counsel and signed a declaration in May 1991. Finally, even if Primpas had testified at trial about petitioner's appearance in jail the night of the murder, the prosecution might easily have explained this as being attributable to other factors, including being jailed on a murder charge.

Finally, Primpas' value as a witness is especially doubtful since he possessed information which was extremely prejudicial to petitioner. As noted, Primpas told Gillingham that petitioner told him on the night of the murder that he remembered talking to Rodriguez while holding a knife (Ex. 166), and that he went to the Bardsley residence "to have sex" with her and then stabbed her in the stomach. (Ex. 172.) Primpas, who was a practicing criminal defense attorney, also reported that he had been told by some of his clients who were in jail that petitioner had boasted in jail about having murdered Rodriguez. Primpas informed Gillingham that before the murder, petitioner had told Primpas that he was unhappy, that he wanted to go back to state prison, and that was going to do "something crazy" to get back to prison. All of this information would have directly conflicted with the theory that petitioner was too intoxicated to know what he was doing and did not in fact form the intent to kill Rodriguez. Thus, Gillingham would have taken a considerable risk that this highly damaging information would be exposed to the jury during cross-examination of Primpas.

In sum, Gillingham appears to have made a reasoned tactical decision not to use Primpas as a witness because of his lack of credibility and because allowing Primpas to be cross-examined could have been very costly to the defense. Moreover, even if Gillingham's decision was not a strategic one, the decision nevertheless did not prejudice petitioner's defense

because Primpas' testimony would not have supported an intoxication theory or a lack of intent argument.

(3) Roger Meunier

Petitioner's related argument regarding Roger Meunier is equally unpersuasive. Meunier, an admitted alcohol, marijuana, and LSD user, had no knowledge of petitioner's drug usage or mental state on the day of the murder, and could only testify that he had seen petitioner use drugs in the past. His value as a witness for petitioner was minimal at best.

iv. Potential Rebuttal Evidence Suggesting that Petitioner was Not Intoxicated

Not only is petitioner's evidence in support of his intoxication defense insubstantial in its own right, but its introduction would have forced Gillingham to confront evidence that would have severely undermined petitioner's proposed intoxication defense. In October 1983, Gillingham summarized the state of the toxicology evidence in a letter to Dr. Vicary. He noted that petitioner's blood and urine samples were obtained at 8:30 p.m., approximately seven hours after the murder; that the LAPD urine testing showed a .01% alcohol level, with no trace of drugs; and that the defense testing showed no alcohol or drugs other than trace metabolites of marijuana. (Ex. 93.)

In a handwritten note dated August 9, Gillingham explained his thinking with regard to the disadvantage of attempting to present a diminished actuality defense based on petitioner's alleged intoxication at the time of the murder:

> My overwhelming concern is to keep continuity and credibility and to save defendant's life. That seems the issue. The dope/alcohol opens the specter of the video and certainly [Officers] Arce/Petroski . . . . The little suggestions of guilt mitigation seem to all be loaded with devastating testimonial or argumentative retort.

(Ex. 264.)

Thus, it is clear that Gillingham considered and rejected a diminished actuality defense based on intoxication because such a defense was rife with problems, including the existence of evidence that contradicted any suggestion that petitioner was intoxicated when he murdered Rodriguez, such as the videotape of petitioner's arrest and the testimony of those who saw petitioner after his arrest.

(1) The Videotape of Petitioner's Arrest

Petitioner's arrest was captured on videotape by a television news crew. (Ex. 583.) The brief film clip showed petitioner yelling at the camera, "I am wanted for rape in Florida; you can have all you want!" and being hastened into an ambulance by police officers. A number of those who viewed the film clip, including this Court, found that petitioner did not appear to be grossly intoxicated. To the contrary, at the time of his arrest, which was very shortly after the killing itself, the videotape unquestionably depicts petitioner as both lucid and sober.

Gillingham himself questioned petitioner's level of intoxication after viewing the film. In a March 4, 1983 letter to Dr. Vicary, Dr. Murphy, and Casey Cohen, the mitigation specialist appointed to assist in preparation of the penalty phase, Gillingham wrote that demonstrating that petitioner was under the influence of drugs or alcohol might be problematic because the video displayed petitioner speaking articulately at the time of his arrest. (Ex. 88.)

The mental health experts who were involved in the case also expressed doubts about petitioner's intoxication level after viewing the video. In an October 1982 report, Dr. Michael Maloney ("Dr. Maloney"), a clinical psychologist engaged to conduct psychological testing of petitioner, expressed his doubt that petitioner was intoxicated when he was arrested not long after Rodriguez was murdered:

> Mr. McDowell indicates that he was extremely inebriated at the time of this incident and simply does not remember what occurred. From viewing the videotapes, however, he did not appear to be overly inebriated. He spoke in a clear voice and, although his comments were somewhat self-destructive, his speech made sense. He did not appear to stagger, although this was somewhat difficult to determine because he was with police officers. In general, however, his overall appearance did not suggest extreme inebriation.

(Ex. 207.) Then, at the evidentiary hearing before this Court, Dr. Vicary testified that petitioner's account of his intoxication may or may not have been consistent with the video, suggesting that petitioner's belligerence and agitation in the video could also be a result of being arrested after committing a horrible crime. (Evid. Hrg. Tr. at 372.)

The evidence shows that the prosecutor was prepared to use the videotape of petitioner's arrest at trial if necessary. (Ex. 218.) Thus, had Gillingham chosen to present any testimony concerning petitioner's intoxication as petitioner now contends he should have done, such testimony would have enabled the prosecution to rebut the evidence by introducing the videotape with its damaging portrayal of defendant in a state not resembling intoxication.

(2) Persons who saw Petitioner After His Arrest

A defense based on intoxication would also have been undercut by the potential testimony of persons who saw petitioner after his arrest. For example, Officer Petroski, the arresting officer, stated that petitioner "wasn't under the influence of anything" when he was arrested.[26/] (Ex. 259.)

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26. Gillingham testified at the evidentiary hearing that he thought he recalled being aware of Petroski's opinion that petitioner was not

Officer Michel, who accompanied petitioner to the hospital after his arrest, described petitioner as crying frequently and being loud and boisterous at times at the hospital, but never attributed that behavior to being under the influence of alcohol or drugs. Similarly, Glenn Miller, the paramedic who transported petitioner to the hospital, testified at trial that he was trained to detect alcohol and drug intoxication, but that he did not notice any symptoms of drug or alcohol intoxication. Finally, on the night of his arrest, hospital personnel described petitioner as alert, oriented and cooperative. (Ex. 213.)

v. Conclusion

The Court finds that Gillingham took appropriate and adequate steps to investigate a defense based on petitioner's alleged intoxication at the time of the murder. Gillingham was aware that merely showing that petitioner occasionally used drugs and alcohol would be insufficient to obtain an instruction on petitioner's diminished mental state. (Ex. 214.) Gillingham expended reasonable efforts to obtain evidence that petitioner had actually used alcohol and drugs the morning of the murder in order to demonstrate that petitioner was intoxicated when he murdered Rodriguez: he pressed the prosecution for alcohol and drug testing results, he had the blood and urine samples independently tested, he interviewed Speare Primpas twice, and he made diligent attempts to locate Andy.

Nor has petitioner demonstrated any possibility of prejudice. Petitioner presented no evidence that would have supported a finding that he was intoxicated at the time of the murder. Nor has he presented evidence that would have corroborated Gillingham's argument that petitioner did not form the specific intent to murder Rodriguez.

The Court finds that Gillingham's representation of petitioner at the guilt phase was not in any way ineffective with

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significantly under the influence of drugs or alcohol at the time of his arrest. (Evid. Hrg. Tr. at 129.) Gillingham's trial notes support this statement. (Ex. 264.)

respect to the investigation or presentation of a potential defense based on intoxication. Furthermore, the Court finds no reasonable probability that the outcome of the guilt phase would have been different had the defense of intoxication been pursued more vigorously and presented to the jury.

b. Petitioner's Psychological Disorder

Petitioner also asserts that Gillingham's assistance was ineffective in that he failed to present evidence of petitioner's impaired mental state due to Post-Traumatic Stress Disorder ("PTSD"). Petitioner's argument is without merit as he is unable to demonstrate that he was actually suffering from PTSD at the time he murdered Rodriguez.

Dr. Vicary, who was appointed to assist Gillingham in considering all psychiatric aspects of the case, screened for PTSD symptoms during his interviews with petitioner but found that the symptoms were either not present, not mentioned by petitioner, or were attributable to anxiety about the upcoming trial. (Evid. Hrg. Tr. at 384-89.) Although Dr. Vicary met with petitioner on five occasions for approximately six hours, discussed PTSD with Gillingham, Butler, Dr. Maloney and Casey Cohen during at least one team meeting (and possibly two),[27] and was aware that Gillingham was interested in PTSD (Evid. Hrg. Tr. at 382), Dr. Vicary never offered an opinion that petitioner suffered from PTSD or that PTSD might be a basis for arguing that petitioner lacked the intent to kill Rodriguez. Indeed, Dr. Vicary testified at the evidentiary hearing before this Court that PTSD was not considered to be a viable option at the time:

> In the work on the case that was done by myself and Dr. Maloney and Dr. Murphy none of us concluded that that diagnosis really emerged from all of the data or that that was in my own view a wise and prudent way to present the information to the jury.

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27. Dr. Murphy also attended the second meeting.

(Evid. Hrg. Tr. at 368.)

Dr. Jay Jackman's ("Dr. Jackman") latter day findings of PTSD do not persuade the Court to question Gillingham's actions regarding the presentation of a diminished actuality defense based on PTSD. Dr. Vicary interviewed petitioner and observed petitioner closer in time to the murder than did Dr. Jackman, yet Dr. Vicary did not find the presence of PTSD. Similarly, neither Drs. Maloney or Murphy found petitioner to be suffering from PTSD.

Gillingham, therefore, had ample justification for rejecting a diminished actuality defense based on PTSD. Morgan, 24 F.3d at 52.

c. Petitioner's Chronic Substance Abuse

Petitioner has also alleged that Gillingham was ineffective in failing to present evidence of petitioner's chronic substance abuse to support the diminished actuality defense. The Court's view is the same with respect to this claim as with respect to the claims of intoxication and psychological disorder. Each of the mental health experts consulted by Gillingham knew of petitioner's long history of drug and alcohol usage, yet none of them suggested that his substance abuse, by itself, could establish that petitioner did not form the intent to kill Rodriguez. Accordingly, Gillingham's decision not to raise chronic substance abuse as a defense in the guilt phase does not show that his performance was deficient in any way nor was it likely to have prejudiced petitioner's defense.

2. Penalty Phase -- Gillingham's Failure to Present Sufficient Mitigating Evidence and to Dissute the Aaqravatinq Evidence

Petitioner maintains that Gillingham provided him with ineffective assistance at the penalty phase by presenting only a fraction of the available mitigating evidence and by failing to dispute one aspect of the evidence in aggravation presented at the penalty phase.

a. Mitigating Evidence

Petitioner faults Gillingham's failure to present as mitigating evidence at the penalty phase, evidence of (1) petitioner's intoxication at the time of the murder; (2) the physical, sexual, and psychological abuse petitioner suffered as a child; and (3) petitioner's longstanding substance abuse. Further, in an argument not advanced until the evidentiary hearing, petitioner also faults Gillingham for recklessly deciding not to present a mental health expert to connect petitioner's abusive childhood with his adult behavior.

i. Intoxication

Petitioner's contention that Gillingham erred in failing to present the mitigating evidence of his intoxication at the penalty phase fails for the same reason this argument fails with respect to the guilt phase: other than the testimony of petitioner himself, petitioner has no evidence reasonably supporting the claim that he was intoxicated at the time of the murder.

Gillingham made a reasonable strategic decision not to call petitioner as a witness during the guilt phase. (Ex. 265.) Gillingham's concerns about petitionerts testimony applied with equal force to guilt phase as well as penalty phase testimony. Gillingham expressed further concern that, if petitioner were to testify, he should testify at the guilt phase since the scope of cross-examination would be "more limited." (Ex. 525.) Moreover, petitionerts testimony regarding the extent of his intoxication at the time of the murder was uncorroborated, questioned by Gillingham's own consulting expert witnesses, and would likely have been clearly refuted by evidence available to the prosecution.

Furthermore, even if petitioner had succeeded in establishing his intoxication at the time of the murder, "there is [no] reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. At the penalty phase, petitioner presented

powerful evidence of an extraordinarily abusive childhood. The jury was nonetheless not persuaded to choose life over death. In contrast, the proffered evidence of petitioner's intoxication was neither reliable or persuasive. The fact that the jury was not able to consider this evidence does not "undermine confidence in the outcome" of the penalty trial. Strickland, 466 U.S. at 694.

ii. Physical and Psychological Abuse Petitioner Suffered as a Child

From the outset, Gillingham made a considerable effort to investigate and learn about petitioner's childhood and the possible effects it may have had on his adult behavior. Gillingham's trial file, for example, contains evidence that he collected articles and research regarding child abuse and other potential areas of mitigation,[28] and that he attempted to summarize petitioner's life in reasoned manner for possible use at trial.[29] In addition, Gillingham had an experienced mitigation specialist, Casey Cohen, appointed to assist in

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28. See Ex. 194 (ordering a number of reprints discussing child abuse and its effect on children); Ex. 195 (excerpts of an article entitled "For Your Own Good: Hidden Cruelty in Child-Rearing and the Roots of Violence"); Ex. 199 (letter seeking information regarding research being conducted on chronic stress and child abuse); Exs. 201, 202 (response to Ex. 199, summarizing research about the psychological make-up of abusive parents); Ex. 203 (series of articles about family violence); Ex. 204 (bibliography of child abuse books and journals); Ex. 205 (collection of data regarding child abuse); Ex. 215 (bibliography compiled at UCLA Biomedical Library regarding child abuse, homosexuality, alcoholism, and drug usage); and Ex. 582 (list of miscellaneous experts on sexual abuse, PTSD, and drug abuse).

29. See Ex. 326 (notes of interviews with the defense's penalty phase witnesses at the Embassy Hotel), Ex. 330 (chronological summary of places petitioner lived), Exs. 331, 334 (chronological summary of significant events in petitioner's life), Ex. 332 (digest of Cohen interviews) and Exs. 337, 571 (extensive notes about petitioner's life).

preparation for the penalty phase, who traveled to Florida to interview numerous individuals with ties to petitioner.[30]

In assessing petitioner's ineffective assistance of counsel claim based on Gillingham's failure to present sufficient mitigating evidence of petitioner's abusive childhood at the penalty phase, the Court gives considerable weight to the wishes expressed by petitioner at the time of trial with respect to the manner in which the defense at the penalty phase was to be conducted. See, e.g., Jeffries v. Blodgett, 5 F.3d 1180, 1197-98 (9th Cir. 1993) (trial counsel was not ineffective for acquiescing to the defendant's demand that the defendant's family members not testify at the penalty phase); Campbell v. Kincheloe, 829 F.2d 1453, 1463 (9th Cir. 1987) (trial counsel was not ineffective for failing to interview the defendant's family in preparation for the penalty phase when the defendant insisted that his family not be contacted).

The trial transcripts reveal that petitioner was vehemently opposed to his family members testifying at the penalty phase. On the Friday on which the penalty phase was to begin, Gillingham noted that he and petitioner disagreed regarding the defense strategy. (16 Rep. Tr. 2012-20.) The court granted Gillingham a short continuance to discuss penalty phase strategy

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30. Specifically, Cohen tape-recorded interviews with David Bamford (petitioner's construction worker colleague), Chris Wilder (owner of the construction company that employed petitioner), Scott Campbell (petitioner's acquaintance since they were teenagers), Patricia H. (Florida rape victim), Faye Edwards (nurse at Florida State Hospital when petitioner was in the Mentally Disordered Sex Offender Program), Cheri Jacques (petitioner's Florida probation officer), Bonnie Haynes (neighbor of the McDowell family during petitioner's childhood), Stephen Haynes (petitioner's neighbor when both were young), Joann Massey (petitioner's neighbor during his teen years), David and Ethel Pilgrim (petitioner's neighbors when he was in his late teens and early twenties), William Roberts, Jr. (former minister at the church the McDowell family attended) R.W. Rogers (then-current pastor of family church), Kathryn Rabon (petitioner's sister), Thomas McDowell (petitioner's brother), Marshall Brakefield (petitioner's maternal uncle), William Brakefield (petitioner's maternal uncle), Theresa Fillyaw (petitioner's sister), Shirley McDowell (petitioner's mother), and Charles McDowell, Sr. (petitioner's father).

with petitioner and his family. (Id.) When the penalty phase began the following Monday the disagreement between Gillingham and petitioner had not been resolved. That morning, petitioner requested and received an in camera hearing with the court, outside the presence of the prosecutor. (17 Rep. Tr. at 2124-25.) Gillingham spoke first:

> There is a disagreement as to what ought to happen in the penalty phase. I am prepared to go forward with witnesses. I have spent a lot of hours thinking about it, believe me, and a substantial period of time talking about it, talking to Mr McDowell about it. We disagree. It's my understanding, of course he expressed himself, he would rather there be no opening statement, there be no witnesses and, I'm not sure, no closing argument or not, but that certainly was articulated at one time.

17 Rep. Tr. at 2126 (emphasis added).)

Petitioner then stated to the court:

> There are witnesses that we have that I have no discrepancies about, but there are some I would rather he not bring on for the fact that it will bring -- or open old wounds that are not necessary to be opened regardless to what [sic] the consequences of [sic] myself is.
>
> I don't feel that these witnesses can help me. They can only hurt myself and my family. And these witnesses, I might add, are a part of my family.
>
> There are two witnesses I don't mind being brinaing in and questioninq and whatever, but the rest of them, as far as my family is concerned, I would rather they not be brought in.

(17 Rep. Tr. at 2127) (emphasis added).

The court refused to take any action, noting that its role was not to provide the defense with strategic advice. Gillingham responded that he was not seeking such advice as he had already decided how the defense would proceed. (Id.)

After Gillingham presented petitioner's uncle as the first witness to testify about petitioner's abusive childhood, petitioner sought to be excused from the trial:

> [Gillingham]: Your Honor, Mr. McDowell has asked to be excused as I've indicated earlier. He was opposed to all of this. I have asked him if he could deal with it at least up until his mother. He thinks he can.

(17 Rep. Tr. at 2192.) The court stated that petitioner probably could not be excused, but asked for legal authority with regard to the issue. (17 Rep. Tr. at 2193.) The following morning there was a brief discussion between Gillingham and the court regarding whether it was necessary to shackle petitioner because of his agitation about the testimony. (18 Rep. Tr. at 2241-42.)

In light of all the circumstances, Gillingham was not deficient in failing to present additional evidence regarding petitioner's childhood. At the penalty phase, Gillingham was forced to balance his obligations as an advocate with his client's strongly held views as to the manner in which to present the defense. Petitioner was violently opposed even to the mitigating evidence that was presented through the testimony of his family members. Nonetheless, Gillingham succeeded in eliciting a substantial amount of testimony concerning petitioner's childhood. Petitioner does not identify any significant information that was not already presented to the penalty jury. The Court concludes that Gillingham cannot be faulted for failing to present additional evidence concerning petitioner's abusive childhood.

Furthermore, petitioner cannot demonstrate any prejudice flowing from the failure to present this additional family background information. This Court has "compare[d] the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995). Accord Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995). As in the situation confronted in Bonin, "[a]lmost all of the childhood mitigation evidence offered by [petitioner] at the evidentiary

hearing was utilized by [trial counsel]." Id. See also Williams v. Calderon, 52 F.3d 1465, 1471 (9th Cir. 1995) (possibility of prejudice "greatly diminishe[d]" where "the jury was exposed to much of the evidence [petitioner] complains was omitted due to counsel['s error.") The only significant fact not presented by Gillingham was that petitioner's substance abuse dated back to his childhood. The jurors were well aware that petitioner had endured a brutal and abusive childhood. Yet, after hearing witnesses recount numerous incidents ot terrible physical and emotional trauma inflicted upon or witnessed by petitioner, the jury found that a sentence of death was appropriate. The Court finds that the absence of any slight amount of additional evidence relating to petitioner's childhood does not "undermine confidence in the outcome" of the penalty trial.

iii. Expert Testimony Regarding the Interplay between Petitioner's Childhood and the Murder

Petitioner next faults Gillingham for failing to present a mental health expert to draw a connection between petitioner's abusive childhood and his adult behavior. Though they never testified at the penalty phase, three mental health experts were appointed to assist Gillingham in preparing petitioner's defense: Dr. Vicary, a forensic psychiatrist with a J.D. degree, who was appointed to develop possible psychiatric defenses, including diminished capacity, and mitigation at the penalty phase (Ex. 83); Dr. Maloney, a clinical psychologist, who was engaged to perform psychological testing on petitioner; and Dr. Murphy, a psychologist with an expertise in homosexuality, who was appointed to elicit information from petitioner that would shed light on the sexual nature of petitioner's crime.

Gillingham and the three experts met as a group on at least one occasion to discuss the case generally, to view the videotape of petitioner's arrest, and to view the movie that petitioner watched the night before the murder. During their meeting, they also discussed PTSD. From time to time,

Gillingham provided the experts with additional documents and information gathered from various sources.

Significantly, the experts agreed to, and did, share their own reports with each other, an arrangement of which Gillingham was aware. Dr. Vicary interviewed petitioner five times, but never wrote a report. Dr. Maloney interviewed petitioner three times in June and August 1982 and submitted his written report in October 1982. Dr. Murphy interviewed petitioner twice, on March 31 and April 1, 1983, and circulated his report (the "Murphy report") later in April 1983. (Ex. 229.)

The Murphy report contained information which was extraordinarily prejudicial to petitioner. Among the most damaging contents of the report is a sexual fantasy which petitioner revealed to Dr. Murphy during the March 31 interview:

> He finds a woman and brings her to a house he has built. The house has a labyrinth of dungeons, in which there are five dungeons one being enclosed in another. He places his female victims in the dungeons progressively and when he reaches the last dungeon, he not only rapes the woman, but then either slits her throat or strangles her to death.

(Ex. 229 at 3.) The Murphy report also records that petitioner was "fascinated by W[orld] W[ar] II" and was particularly interested in the Nazi concentration camps and the sadistic treatment of prisoners." (Id. at 4.) The report also contains petitioner's reference to the Curtis M. and Patricia H. incidents, as well as petitioner's admission to having "performed fellatio and cunnilingus on children in [his wife's] care." (Id. at 2, 6.) Finally, Dr. Murphy's report reflects that "[w]hen asked about his previous incarcerations and institutionalizations, [petitioner] indicated he was able to manipulate mental health practitioners to think what he wanted." (Id. at 5.)

Gillingham read the Murphy report in April 1983 and found its contents to be very troubling. (Ex. 90.) He conveyed his thoughts to Dr. Vicary in a letter dated April 18, 1983 which also acknowledged that Dr. vicary possessed a copy of the

Murphy report. (Id.) As of Auqust 8, 1984, Gillingham apparently intended for Dr. Vicary to testify at the penalty phase. However, at a meeting that evening between the two to review Dr. Vicary's intended testimony, Gillinqham was reminded that Dr. Vicary had read the Murphy report. At that point, Gillingham realized that the jury might learn about the contents of the Murphy report if Dr. Vicary testified. Gillingham informed Dr. Vicary that he believed that the Murphy report was too prejudicial to expose to the jury. Gillingham stated unequivocally that he did not want to take the risk that the jury might learn of the contents of the report. Dr. Vicary tried to convince Gillingham that the negative information in the report could be explained to the jury as simply another manifestation of petitioner's childhood traumas. By the end of the meeting, however, Gillingham had made the decision that Dr. Vicary would not testify, and conveyed thws to him.

The next morning, Gillingham wrote a note to the file explaining his decision not to use Dr. Vicary's testimony in the penalty phase:

> Went to Vicary to p[repare] test[imony]. He had a copy of Murphy's report. Devastating! Our decision given the risks, no affirm[ative] testimony. Do not want fantasies, children w[ith] wife to come out. Discovery problems opened, [Patricia H.] rape/[Curtis M.] opened. Okay to paint bleak, but Murphy's conjures Nazis, dungeons, and killing. Hard dec[ision] but clear.

(Ex. 248; Evid. Hrg. Tr. at 158.)

Gillingham's file note and Dr. Vicary's recollections of the August 8, 1984 meeting between the two (Evid. Hrg. Tr. at 390-93) persuade the Court that Gillingham made a reasoned tactical decision not to present Dr. Vicary's testimony, and that his decision was neither hasty nor impulsive. As the attorney, Gillingham had the prerogative to make the final decision regarding whether to use Dr. Vicary as a witness. In opting not to present Dr. Vicary's testimony, Gillingham was justified in believing that the contents of the Murphy report were too

prejudicial to risk their introduction to the jury despite Dr. Vicary's belief that he could explain the damaging information as the product of petitioner's abusive childhood.

Gillingham had no alternative means of presenting a mental health expert without risking disclosure of the Murphy report. Dr. Maloney had read the Murphy report pursuant to the experts agreement to circulate their reports to each other, and Dr. Murphy, as its author, knew all the information contained in the report as well. Had Gillingham decided to retain another psychiatrist to support the defense theory of mitigation, he could not have ethically withheld the Murphy report from the new expert. An attorney cannot be found to have rendered constitutionally deficient performance by rejecting an avenue that required him to violate his ethical duties to the court. Moreover, even if Gillingham had chosen that route, a new expert might very well have elicited from petitioner the same prejudicial information that Murphy included in his report.

Finally, while Gillingham may have been remiss in failing to deal with the ramifications of the Murphy report prior to August 1984, this delay did not harm petitioner. Gillingham's options in August 1984 were no different than the options available to him in April 1983 when he and Dr. vicary first received the Murphy report. In fact, none of the options were ideal at any time, and the route ultimately taken by Gillingham was reasonable under the circumstances. Gillingham had no viable means of presenting a mental health expert's testimony at the penalty trial. Accordingly, Gillingham's decision not to offer a mental health expert at the penalty phase did not violate petitioner's right to the effective assistance of counsel.[31/]

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31. In assessing this claim, the Court has also considered the real possibility that any expert testimony presented by the defense would have been countered by expert testimony from the prosecution. Although Gillingham did not present any testimony from mental health experts for the defense at the penalty phase, the prosecution nevertheless sought to present the rebuttal testimony of a psychiatrist in order to define the terms "mentally disordered sex offender" and "sociopath," and to discuss the effects of childhood abuse. (19 Rep. Tr. at 2305.) The prosecutor argued that the psychiatrist would testify that individuals with petitioner's background do not

Even if a mental health expert had drawn a connection between petitioner's harsh childhood and his subsequent history of inflicting violence upon others, the Court is not persuaded that there is a reasonable probability that the outcome of the penalty phase would have been different. Psychiatric testimony is not a panacea for a weak penalty defense; it will not automatically neutralize all evidence in aggravation. Petitioner has failed to demonstrate that the testimony of a mental health expert -- in addition to the lay witnesses' testlmony that the jury accually heard -- would have been reasonably likely to overcome the aggravating evidence.

iv. Gillingham's Closing Argument

Petitioner also faults Gillingham for failing to connect, during his summation, any of the mitigating evidence -- especially the evidence relating to petitioner's childhood -- to any of the statutory mitigating factors.

As the Supreme Court recognized in Strickland, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id., 466 U.S. at 693. As such, attorneys must be "granted reasonable latitude to fashion closing arguments." United States v. Gray, 876 F.2d 1411, 1417 (9th Cir. 1989), cert. denied, 495 U.S. 930 (1990). Recognizing these limitations, the Ninth Circuit has been very cautious in scrutinizing defense attorneys' closing arguments. Prior to condemning an argument constitutionally deficient, the Ninth Circuit has effectively

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necessarily become mentally disordered sex offenders or sociopaths, but rather, can become law-abiding citizens. (19 Rep. Tr. at 2330.) Gillingham, however, strongly opposed the request, partly because there had been no expert testimony presented by the defense. (19 Rep. Tr. at 2308.) After an extended hearing, the court ultimately denied the prosecution's request for a one-day continuance to permit a psychiatrist to testify in rebuttal. Thus, even though the prosecution was ultimately prohibited from presenting the psychiatrist's testimony in rebuttal, the possibility was real that had the defense presented expert testimony first, the prosecution would have countered it with expert testimony of its own.

required showing that defense counsel "failed to function as the Government's adversary" and "utterly failed to 'subject the prosecution's case to meaningful adversarial testing. United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) (quoting United States v. Cronic, 466 U.S. 648, 659 (1984)). The Ninth Circuit has found performance to be constitutionally deficient in only one instance: where defense counsel essentially conceded that the prosecution had met its burden on all aspects of the case.

For example, in Swanson, the Ninth Circuit held that it was ineffective assistance of counsel for the defense lawyer to "inform[] the jury that it is his view of the evidence that there is no reasonable doubt about the only factual issues that are in dispute." Swanson, 943 F.2d at 1074. The appellate court also condemned a trial attorney's summation noting that "[t]here is simply no tactical reason to argue to the jury that executing [the capital defendant] would be an outcome favorable to [the defense]." Wade v. Calderon, 29 F.3d 1312, 1324 (9th Cir. 1994), cert. denied, U.S. ,115 S. Ct. 923 (1995). See also Harris v. Wood, 64 F-3d 1432, 1438 (9th Cir. 1995). In these limited instances, the Ninth Circuit has found that "counsel's argument resulted in the 'breakdown in the adversarial process that our system counts on to produce just results.'" Wade, 29 F.3d at 1324 (quoting Strickland, 466 U.S. at 696).

While Gillingham may have failed to explain to the jury how the mitigating defense evidence should be applied to each of the various penalty phase factors, he cannot be accused of having abandoned his client. The record clearly demonstrates, and petitioner has failed to dispute the evidence, that Gillingham made a tactical decision "not to mention the [statutory] factors at all." (19 Rep. Tr. at 2316.)

Moreover, Gillingham's decision was not unreasonaLle. Even ln the absence of any direct reference to the sentencing statute, Gillingham's argument had several significant defense-oriented themes.[32] Gillinqham hiqhlighted the one

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32. Gillingham commenced by disputing the prosecutor's interpretation of the list of aggravating and mitigating factors. (19 Rep. Tr. at 2393-95.)

mitigation theme on which he had elicited evidence -- petitioner's sexual victimization as a child and the extreme physical abuse that was inflicted on him and his siblings. (19 Rep. Tr. at 2404-09.) He also argued for a life sentence without parole based on facts which the jurors certainly knew -- that, in light of the long history of capital punishment and the large death row population in the United States, "that killing a person, the defendant in a particular case, does not necessarily stop killinq by another person." (19 Rep. Tr. at 2401-03.) Although Gillingham's focus was not always clear, and at times the argument lacked continuity, Gillingham's argument waq never professionally unreasonable. In light of the wide latitude properly siven to defense counsel in framing their arguments, Gillingham's summation was not constitutionally inadequate.

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He then urged the jury to reject the prosecution's invitation to sentence petitioner to die simply because petitioner had the benefit of the judicial system to protect him against an arbitrary killing; Gillingham stressed to the jurors that their role was as a bulwark to protect against private vengeance and that they were obligated to follow the law. (19 Rep. Tr. at 2395-96.) Gillingham's decision not to argue lingering doubt, and not to describe the execution ritual or the severity of a non-parolable life sentence (19 Rep. Tr. at 2396-2401) are well within "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Accord Hamilton v. Vasquez, 17 F.3d 1149, 1164 (9th cir.), cert. denied, _ U.S. , 114 S. Ct. 2709 (1994). Gillingham returned his focus to the ultimate issue of whether the death penalty was warranted. (19 Rep. Tr. at 2401-03.) He argued that, in light of the large death row population, the long history of the death penalty within the United States, and the large number of executions that had taken place in California prior to 1968, sentencing petitioner to death ought not be viewed as a step toward stopping future killings. (19 Rep. Tr. at 2401-03.) He reached his main theme in arguing that, while not an excuse, petitioner's history as a childhood victim of physical and sexual abuse "helps you understand what happened here." (19 Rep. Tr. at 2405; 19 Rep. Tr. at 2404-09.) Gillinghamfs anecdote about a boy with balloons tied to his trousers was not, as asserted by petitioner, nonsensical; Gillingham noted the chiidhood fun and dreams of which petitioner was deprived. He concluded by emphasizing to the jurors that they were the embodiment of our society's norms.

v. Conclusion

The prosecution presented an exceedingly strong case in aggravation at the penalty phase. Given the circumstances Gillingham faced with an uncooperative client and a highly prejudicial psychologist's report, he nevertheless presented a compelling case in mitigation. The jury considered the evidence and decided that a sentence of death was the appropriate punishment for petitioner's offenses. The petitioner has not made a showing that the jury was unjustifiably deprived of important mitigating information that any reasonably competent defense attorney would have presented.

b. Failure to Challenge Aggravating Circumstances

During his penalty summation, the prosecutor argued that petitioner bore greater moral culpability for the murder because he committed it at a time when he knew that Rodriguez' two-year old daughter, Valaria, would be present at the Bardsley's residence. When interviewed by the police, Rodriguez' husband apparently said that Rodriguez almost did not go to work at the Bardsley residence that day because no babysitter was available for Valaria. Petitioner contends that, from this statement, the jury could have inferred that a babysitter normally cared for the child while Rodriguez was at work. Based thereon, petitioner argues that Gillingham provided deficient performance in failing to rebut the prosecutorts argument with the information contained in this police report.

In a declaration presented to this Court, Gillingham stated that he simply overlooked the police report. Petitioner fails to acknowledge, however, that Gillingham also possessed a written report of an interview with the Mr. Bardsley, who said it was "normal" for Rodriguez to bring her child to work with her. (Ex. 509.) Gillingham can hardly be faulted for failing to rebut the prosecutor's argument when doing so would have invited evidence that petitioner in fact had a basis for knowing

Rodriguez had a young child with her when he murdered her. This evidence would have been particularly prejudicial when combined with the evidence that petitioner had raped Patricia H. while her young son was in the house.

3. Failure to Request Appointment of a Second Attorney

Finally, petitioner contends that Gillingham's representation was below professional standards because he failed to have second counsel appointed in the case. Petitioner's claim, however, is both factually inaccurate and insufficient to support a finding of ineffective assistance of counsel.

In February 1983, Gillingham had a second attorney, Marilyn Butler, appointed to assist him in preparing petitionerts case. (Ex. 136.) Prior to working with Gillingham, Butler had been a law clerk for the Federal Public Defender's Office, both during and after law school. She was appointed to petitioner's case two months after being admitted to practice. (Ex. 130.) Though Butler had never before participated in the defense of a murder case and had had little experience before working on petitioner's case, she did much of the trial preparation for Gillingham, including gathering documents, conducting research, reviewing evidence, interviewing petitioner and potential witnesses, and performing other tasks Gillingham requested. Butler's name appeared with Gillingham's as counsel for petitioner on pleadings filed with the court, (Exs. 579, 580), and in July 1983, Gillingham requested and received an increase in Butler's hourly rate on the basis of her performance. (Exs. 137, 138.) Butler ceased working on the case in April 1984, prior to the commencement of trial, when she accepted a position as a federal public defender.

Thus, although Gillingham conducted the actual trial without the assistance of another attorney, petitioner in fact had the benefit of two attorneys during the pretrial stage. Gillingnam has stated that Butler's assistance was quite adequate for the case and that the reason he did not seek another second counsel after she ceased working on the case was because he did not

find it necessary. (Evid. Hrg. Tr. at 23, 24.) The Court accepts Gillingham's assessment. Moreover, petitioner has failed to explain how the absence of a second attorney prejudiced his defense at either phase of the trial.

4. Conclusion

Having reviewed the entirety of the evidence in this case, includinq the pleadings, transcripts, and exhibits, the Court finds that Gillingham provided petitioner with professionally competent assistance in preparing and presenting his defense. His performance far surpassed that required by the Constitution. Nothing Gillingham did, by act or omission, prejudiced petitioner in such a way that there is a reasonable probability that the outcome of the guilt or penalty phase would have been different had Gillingham represented petitioner in the manner now envisioned by habeas counsel.

B. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S RESPONSE TO JURY NOTE REQUESTING CLARIFICATION

The jury was originally charged using a slightly modified version of a standard California jury instruction:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and (any other aspect of the defendant's character or Personal history that the defendant offers as a basis for a sentence less than death).

(Clerk's Tr. at 698-700. Cf. CALJIC 8.84.1 (1984 Rev.) (emphasis added).)

The jury was further instructed:

After having heard all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

one mitigating circumstance may outweigh several aggravating circumstances, or one aggravating

circumstance may outweigh several mitigating circumstances. You shall give to each the weight to which you find it to be entitled.

(Clerk's Tr. at 703. Cf. CALJIC 8.84.2. (emphasis added).)

After slightly more than seven hours of deliberations, the jury submitted the following note:

> Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which [of the] following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.
> 2. Love/hate relationship with father/mother.
> 3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.
> 4. Religious extremes confused defendant.
> 5. Confusing sexual more's [sic] at home (incest), with mother condoning or aware of incest/abuse.
> 6. Accused of death of favorite sister.
> 7. Stress of divorce from family.
> 8. Reiection of mother's love during teen years.
>
> Thank you.

(3 Clerk's Tr. at 684-85; 19-A Rep. Tr. at 2429-30.)

Gillingham urged the judge to instruct the jury that the items listed in the note were proper circumstances to consider in mitigation. (19-A Rep. Tr. at 2431.) The prosecutor agreed that the items listed were proper mitigation factors, but suggested that the judge simply instruct the jury to continue deliberating. (19-A Rep. Tr. at 2437.) The judge rejected both suggestions because, in light of the 11-1 vote, he did not want anything said by him to have a coercive effect on the panel's decision. He was properly concerned that they were asking not for clarification of a governing rule of law, but for the court's view as to the weight and effect to be given the evidence before

them. Finally, the court made the following comments to the panel:

> You're asking me, in essence, to decide the case for you. You have been instructed as to the law and I hate to throw you out like this. But if you go back and read the instructions, in particular you have one instruction in which the mitigating and aggravating factors are listed.
> Then you have another instruction, the concluding instruction which reads as follows:
> "One mitigating circumstance may outweigh several aggravating circumstances or one aggravating circumstance may outweigh several mitigating circumstances. You shall give each the weight to which you find it to be entitled."
> Those are the two instructions that I think really apply. I would ask you to go back [and] reread those instructions.

(19-A Rep. Tr. at 2435-36.) After the judge made these statements to the jury, the jury foreman stated to the judge that the question had been answered. (19-A Rep. Tr. at 2439.) Over the course of two more court days, with a weekend recess in between, the jury deliberated for another six and one-half hours before returning with a verdict of death. (Clerk's Tr. at 686, 720, 722.)

Petitioner complains that the trial court should have given the jurors supplemental instructions informing them that the eight factors listed in the note were mitigating factors that could be considered in determining the appropriate sentence. Petitioner argues that because the court failed to instruct the jury affirmatively, he was deprived of having the jury consider the mitigating evidence he had proffered, the jury did not consider individualized sentencing, and the jury was influenced to render a verdict of death.

In responding to a note from a jury during deliberations, a court may answer by rereading a previous instruction. See United States v. Haves, 794 F.2d 1348, 1353 (9th Cir. 1986). Such rereading of an instruction in lieu of giving a supplemental

instruction will require reversal of a conviction only if the reread instruction was insufficient to eliminate the confusion, see United States v. Warren, 984 F.2d 325, 330 (9th Cir. 1993), or was actually misleading, see Bollenbach v. United States, 326 U.S. 607, 612 (1946).

The Court's actions did not violate petitioner's constitutional rights. The jurors appear to have been debating two issues: which aspects of petitioner's life they could consider in mitigation, and how those mitigating circumstances should be weighed against the aggravating factors. The instructions repeated by the trial court were responsive to both of those issues. First, the instruction which the judge directed the jury to reread listed the factors to be considered in deciding on the appropriate penalty, including the "catch-all" factor which stated unambiguously that the jury should consider the personal history offered by petitioner.[33] The United States Supreme Court has held that even if the "catch-all" factor does not contain clear language about the defendant's character and personal history, it is nevertheless sufficient to apprise the jury that a defendant's background should be considered in assessing the proper penalty. See Boyde v. California, 494 U.S. 370 (1990). Thus, the judge's instruction to reread the previous instruction about which factors to consider was a legally proper and responsive answer to the jury's note. While, obviously, the court might have devised an alternative instruction which would have been proper, the court did not err in choosing to reinstruct instead. Secondly, to the extent that the jurors were in any way confused about the weighing prccess, the judge correctly advised the jury that one mitigating factor could outweigh several aggravating factors, and that that determination was an individual one.

Since the instructions which the trial court repeated to the jury and directed the jury to reread were neither erroneous

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33. The "catch-all" factorin the instructions given to the jury stated that they should consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death." (Clerk's Tr. at 700.)

nor misleading, the court did not err, nor were petitioner's constitutional rights violated, by the method used in responding to the jury's request for clarification.

## C. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PRESENTATION OF FACTS UNDERLYING PETITIONER'S PRIOR STIPULATED FELONY CONVICTION

In October 1979, petitioner was convicted in Florida of one count of lewd and lascivious conduct pursuant to a guilty plea in connection with the 1977 Curtis M. incident. During the guilt phase, petitioner admitted the conviction outside the presence of the jury and waived his right to a jury trial to prove the prior conviction. The court made clear that the admission of the conviction would not be evidence at the guilt phase.

Petitioner now claims that he admitted the conviction with the understanding that the fact of the conviction would be admitted at the penalty phase[34] only under the sentencing factor found in California Penal Code § 190.3 (c)[35] rather than the sentencing factor found in §190.3(b).[36][37] Over defense

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34. After finding a defendant guilty of first-degree murder and one or more of the special circumstances listed in California Penal Code § 190.2, the case then proceeds to the penalty phase, where the trier of fact must consider a number of factors specified in California Penal Code § 190.3 in deciding whether to sentence the defendant to death.

35. Sentencing factor (c) authorizes the introduction of evidence "of any prior felony conviction" as an aggravating circumstance for purposes of sentencing. See Cal. Penal Code § 190.3(c).

36. Sentencing factor (b) authorizes the introduction of evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Cal. Penal Code § 190.3(b).

37. Petitioner's contention is contradicted by the record, however. Immediately after petitioner admitted the conviction in the guilt phase, the prosecutor, Gillingham, and the court discussed the likely penalty phase

objections at the penalty phase, however, the prosecution was permitted to present actual details of the incident, including the testimony of Curtis M. and his mother, in lieu of the record of the conviction itself. Petitioner argues that the introduction of this hiqhly inflammatory evidence relating to the facts and circumstances underlying the conviction for a prior nonviolent felony -- where petitioner stipulated to the existence of the prior conviction -- violated his constitutional rights because: 1) petitioner's conduct was not proven beyond a reasonable doubt by unanimous verdict; (2) petitioner was deprived of a state constitutional right to a jury trial on all disputed factual issues;[38] (3) the jury heard evidence of petitioner's prior violent conduct even though violence was not an element of petitioner's prior conviction;[39] (4) petitioner's conduct should have been admitted under California Penal Code § 190.3(c), and not under § 190.3(b); (5) the six-year delay between the offense and the amended information alleging the prior conviction was equivalent to pre-indictment delay; and (6) the nineteen-month delay between the filing of the amended complaint and the adjudication of the incident was equivalent to post-indictment delay and therefore violated petitioner's right to a speedy trial.

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witnesses. With petitioner and Gillingham present, the prosecutor stated that he would be calling Curtis M. and his mother to testify at the penalty phase. Neither petitioner nor Gillingham questioned the prosecutor's statement. This would not have been the case if they had truly believed that only the judgment of conviction would be admitted at the penalty phase. (12 Rep. Tr. 1482-1491.)

38. These first two claims are contradicted by the record. During the penalty phase, the jurors were expressly instructed to disregard all evidence relating to the Curtis M. offense unless they were "satisfied beyond a reasonable doubt that the defendant . . . did in fact commit such criminal acts." (Clerk's Tr. at 696.)

39. The crime to which petitioner pleaded guilty did not, by its statutory definition, involve force or violence. Fla. Stat. Ann. § 800.04 defined Petitioner's crime as a second degree felony committed "without the intent to commit involuntary sexual battery." Fla. Stat. Ann. § 800.04.

Petitioner argues further that these problems were exacerbated because (1) the trial court deleted sentencing factor (c) of § 190.3 from the list of aggravating and mitigating factors to be considered at the penalty phase; and (2) even though the court instructed the jury that it could consider the alleged violent crime only if it found that petitioner committed the act beyond a reasonable doubt, the court did not instruct the jury that it must find unanimously that petitioner had committed the offense.

The Court finds no merit in the petitioner's challenge to the presentation of facts underlying his prior felony conviction in connection with the Curtis M. incident. Petitioner's challenges to the presentation of this evidence are premised on the assumption that, having stipulated to the conviction, the underlying facts were no longer relevant. Insofar as state law defines the aggravating factors that may be considered by the jury, Zant v. Stephens, 462 U.S. 862, 878 n.17 (1983), the relevance of this evidence is governed by California law. McKinney S. Rees, 993 F.2d 1378, 1380 (9th Cir. 1993); Estelle v. McGuire, 502 U.S. 62, 67 (1991). The California Supreme Court has explained that "' [w]hen dealing with violent conduct it is not the fact of conviction which is probative in the penalty phase, but rather the conduct of the defendant which gave rise to the offense.'" People v. McDowell, 46 Cal. 3d 551, 567, 250 Cal. Rptr. 530, 538, 763 P.2d 1269, 1278 (1988) (quoting People v. Gates, 43 Cal.3d 1168, 1203, 240 Cal. Rptr. 666, 743 P.2d 301 (1988)). It is not within the province of this federal court to question the state law determination that this evidence was admissible under California Penal Code § 190.3(b). McGuire, 502 U.S. at 67.

Finally, petitioner has provided no legal support for his contention that the time that elapsed between the sodomy of Curtis M. and the filing of the amended information in the capital case should be treated as "pre-indictment delay." Nor has he provided any legal basis for concluding that the time that elapsed between the filing of the amended information and the introduction of this evidence during the penalty phase amounted to "post-indictment delay." No matter how characterized,

however, the due process clause does have a "role to play in protecting against oppressive delay." United States v. Lovasco, 431 U.S. 783, 789 (1977). "[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim." Id., 431 U.S. at 790. Accord United States v. Valenzuela-Bernal, 458 U.S. 858, 869 (1982). Petitioner's claims of unfair delay fail because he has made no showing that the lapse of time rendered the prosecution's evidence unreliable or otherwise prejudiced his defense.

## D. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE INTRODUCTION OF EVIDENCE OF UNADJUDICATED CRIMINAL ACTIVITY

At the penalty phase, the prosecution presented evidence that petitioner committed the uncharged, unadjudicated rape of Patricia H. in Florida in 1981, including the testimony of Patricia H. and her son (who had been in the home during the rape). Since petitioner was never charged with or prosecuted for the rape,[40] he now argues that the prosecutor improperly introduced, and the jury improperly considered, evidence of violent criminal conduct for which petitioner was never charged or convicted.

The United States Supreme Court has not, during the post-Furman[41] era, revisited the question of the constitutionality of admitting unadjudicated conduct during the penalty phase of a capital trial. In 1949, however, the Supréme Court addressed this very question and held that a capital sentencer could properly rely on evidence of unadjudicated crimes as the basis for a sentence of death. Williams v. New York, 337 U.S. 241, 244, 251-52 (1949).

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40. Immediately after the rape occurred, petitioner fled Florida and came to California, and was wanted for the rape in Florida at the time he was arrested in Los Angeles for murdering Rodriguez.

41. Furman v. Georgia, 408 U.S. 238 (1972).

The continued vitality of Williams may be open to debate. The Williams holding arose from a situation where a sentencing judge relied on information in an undisclosed pre-sentence report. This particular practice has been expressly condemned under modern capital jurisprudence. See Gardner v. Florida, 430 U.S. 349 (1977). Nonetheless, the defendant in Williams did not complain of the previously-undisclosed nature of the report, only that the allegations had not been previously adjudicated.

Of equal concern may be the fact that the Court in Williams refused to recognize any constitutional distinction between capital sentencinq and non-capital sentencing. Williams, 337 U.S. at 251. For the past two decades, however, the Supreme Court has consistently affirmed that "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Lankford v. Idaho, 500 U.S. 110, 125 & n.21 (1991) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, Stevens, JJ.) (footnote omitted)). Accord Gardner v. Florida, 430 U.S. 349 (1977). Yet, recently, the Court approvingly cited Williams for its holding that a sentencing body could properly consider unadjudicated conduct in determining the appropriate sentence. See Nichols v. United States,__ U.S.__ , 114 S. Ct. 1921, 1928 (1994) ("Sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior. We have upheld the constitutionality of considering such previous conduct in Williams v. New York, 337 U.S. 241 (1949).") The Ninth Circuit has yet to resolve definitively the precedential weight properly afforded to Williams in a post-Furman capital context.[42/]

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42. In Coleman v. Risley, 839 F.2d 434 (1989) (9th Cir. 1989), reversed

Nonetheless, in the non-capital context, the Ninth Circuit has issued general guidelines:

> The due process clause prohibits a trial judge from enhancing a sentence based on materially false or unreliable information . . . or based on a conviction tainted by constitutional error. . . . We have held, however, that a sentencing judge may rely on "facts relating to a prior acquittal" in imposing an appropriate sentence.

Walker v. Endell, 850 F.2d 470, 477 (9th Cir. 1987), cert. denied, 488 U.S. 926 (1988) (citations omitted).

If a sentencing body may constitutionally rely on the evidence underlying a prior acquittal -- i.e., evidence which a trier of fact has found does not amount to proof beyond a reasonable doubt -- a fortiori, the sentencer should be allowed to consider allegations that have not previously been rejected. Petitioner makes no showing that the testimony of Patricia H. or her son was "false or unreliable." Petitioner was notified in advance of the state's intention to introduce this evidence at the penalty phase, afforded the opportunity to cross-examine these witnesses, and to introduce defensive matter in rebuttal. The jury was instructed that it could not consider the facts underlying these episodes as evidence in aggravation unless it found, beyond a reasonable doubt, that petitioner had in fact

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on other grounds, Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989), cert. denied, 493 U.S. 944 (1989), a split panel of the Ninth Circuit concluded that capital sentencers could properly rely on unadjudicated offenses so long as the supporting evidence was not "false or unreliable." Id., 839 F.2d at 459. One judge dissented, arguing that Williams had been superceded by contemporary death penalty jurisprudence. Id., 839 F.2d at 505-08 (Reinhardt, J., dissenting). On rehearing en banc, the Ninth Circuit reversed the conviction on other grounds, without addressing the admissibility of the unadjudicated crimes. Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989) (en banc) ("Coleman II"), cert. denied, 493 U.S. 944 (1989). Concurring in the en banc decision, Judge Reinhardt again expressed his view that the death sentence was constitutionally infirm because the sentencing judge had relied on evidence of unadjudicated crimes. Coleman II, 874 F.2d at 1292 n.2 (Reinhardt, J., concurring).

committed the conduct alleged. (12 Rep. Tr. at 2416-17.) Petitioner fails to explain why the introduction of the evidence in this case undermines the reliability of his capital sentence.[43] This Court need not reach the question of whether unadjudicated conduct is always admissible because, in this case, the evidence of petitioner's unadjudicated conduct met constitutional requirements of reliability and was therefore properly admitted and considered.

## E. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE PROSECUTOR ELICITED INADMISSIBLE TESTIMONY AND REFERENCED IT AT CLOSING ARGUMENT

Durinq her direct examination, rape victim Patricia H. testified that when petitioner was in her house, he requested a glass of iced tea with a paper towel wrapped around the glass. Patricia H. then testified that she asked petitioner if he wanted the towel around the glass so that his fingerprints could not later be detected. Before Patricia H. continued, the prosecutor requested a side bar conference; he then informed the court that Patricia H. would testify that petitioner answered her question by stating that he had "done enough time" and that he knew "all the tricks." Gillingham objected to the testimony about petitioner having previously served time in jail, and the court ruled that the statement would be excluded under California Evidence Code § 352 as being unduly prejudicial.

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43. The Court's conclusion here is reinforced by the fact that the three other circuit courts of appeal to have considered the issue have similarly held that evidence of unadjudicated crimes is not, per se, inadmissible in a capital sentencing trial. Milton v. Procunier, 744 F.2d 1091, 1097 (5th Cir. 1984); Hatch v. Oklahoma, 58 F.3d 1447, 1465-66 (lOth Cir. 1995); Devier v. Zant, 3 F.3d 1445, 1464-65 (llth Cir. 1993). But see State v. McCormick, 272 Ind. 272, 397 N.E.2d 276 (Ind. 1979) (holding evidence of unadjudicated crimes inadmissible in capital sentencing trial); State v. Bartholemew, 101 Wash. 2d 631, 683 P.2d 1079 (Wash. 1984), cert. denied, 463- U.S. 1203 (1983) (same).

The prosecutor privately instructed Patricia H. not to testify about petitioner having served time in jail unless later instructed that she miqht do so and then resumed questioning Patricia H., repeating the inquiry as to what petitioner had said in response to her question about the purpose of the paper towel wrapped around the glass of iced tea. In spite of the instructions from the prosecutor, Patricia H. responded that petitioner said "he'd done enough time" and "he knew all the tricks." At another side bar conference, Gillingham moved for a mistrial. The prosecutor explained that he had instructed the witness to answer only the part about knowing "all the tricks." Apparently reconsidering its earlier ruling, the court denied Gillingham's motion for mistrial, noting that the testimony was not overly prejudicial. He instructed the prosecutor not to elicit any other information about petitioner's prior jail time, but did not admonish the jury. (17 Rep. Tr. at 2148--51-.) Later, in closing argument, the prosecutor mentioned several times that petitioner "knew all the tricks," but did not refer to the fact that he had previously served jail time. (19 Rep. Tr. at 2360, 2368, 2378.)

Contending that the prosecutor committed misconduct when he elicited inadmissible testimony from Patricia H. and then allegedly referred to it in closing argument, petitioner argues that his constitutional rights were violated because the jury considered evidence of a prior, unspecified incarceration. Both claims are refuted by the record.

The prosecutor did not improperly elicit Patricia H.'s testimony regarding petitioner's prior incarceration. The prosecutor represented that he had informed Patricia H. of the substance of the trial court's ruling on the evidence and instructed her to abide by that ruling. (17 Rep. Tr. at 2150.) Gillingham did not challenge that representation and the trial court obviously accepted it as true. (17 Rep. Tr. at 2151.) The trial judge's "evaluation of the prosecutor's credibility . . . is entitled to qreat deference" by a federal court reviewing a habeas petition. Burks v. Borg, 27 F.3d 1424, 1428 (9th 161 Cir. 1994), cert. denied,___ U.S.___ , 115 S. Ct. 762 (1995). In the absence of countervailing considerations -- and here there are

none -- the credibility finding is presumed to be correct. 28 U.S.C. § 2254(d).

In light of this finding of "good faith," the prosecutor must be found to have taken all reasonable steps to assure that the witness did not transgress the trial court's ruling. An attorney can never guarantee that a witness will not disobey the court's evidentiary rulings. United States v. Olano, 62 F.3d 1180, 1197 (9th Cir. 1995) (citing United States v. Aichele, 941 F.2d 761, 765-66 (9th Cir. 1991)). Having informed the witness of the judge's evidentiary ruling and having instructed the witness to abide by that ruling, the prosecutor cannot be faulted for Patricia H.'s testimony when, through no fault of his own, she repeated the statements on her own accord. Olano, 62 F.3d at 1205.

Moreover, a witness's violation of a judge's evidentiary ruling is subject to harmless error analysis. Olano, 62 F.3d at 1205. Here, even if the prosecutor did bear some culpability for Patricia H.'s transgression, the Court finds that this slight additional testimony did not have "a substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, __ U.S. __, 113 S. Ct. 1710, 1722 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The testimony was brief and isolated and the jury did eventually learn that petitioner was incarcerated as a result of the Curtis M. offense. The trial judge who heard the testimony concluded "I don't think it is adding that much." And, contrary to petitioner's assertions, the prosecutor never reminded the jury of Patricia H.'s statement that petitioner informed her that he had previously been incarcerated.

In assessing whether the prosecutor's argument deprived petitioner of a fair trial, the court "consider[s] first whether the statements were improper and, if so, whether it is more probable than not that the prosecutor's conduct 'materially affected the fairness of the trial.'" United States v. Polizzi, 801 F.2d 1543, 1557 (9th Cir. 1986) (quoting United States v. McKoy, 771 F.2d 1207, 1212 (9th Cir. 1985)). As noted above, the record refutes petitioner's assertion that during his closing argument, the prosecutor impermissibly capitalized on the

inadmissible portion of Patricia H.'s testimony. The prosecutor never reminded the jury of Patricia H.'s statement that petitioner had previously been incarcerated.[44] As there is no factual predicate for this claim, the claim is invalid as a matter of law.

## F. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE PROSECUTOR PRESENTED EVIDENCE AND ARGUMENT REGARDING THE PRESENCE OF RODRIGUEZ' CHILD AT THE SCENE OF THE CRIME AND THE IMPACT OF THE CRIME ON RODRIGUEZ' SURVIVING FAMILY

During closing argument at the penalty phase, the prosecutor made the following comments:

> Is a true picture of the defendant the person who threatened to sodomize and kill Paul [H.], six years old, who was in the other room if Patricia [H.] didn't submit to these ghastly acts? [¶] Doesn't that sound familiar? [¶] Valaria Rodriguez, two years old, was upstairs when the defendant busted in the Bardsley door to attempt the rape of Paula Rodriquez.
>
> . . . .
>
> What are the circumstances of this crime? They're the presence of Valaria, the absence now of her mother, the absence of Maria's mother, the absence of Jose's wife. Those are the circumstances of this crime.
>
> . . . .
>
> He breaks into in [sic] house where there is a two year old girl and her mother. It wasn't by accident that he chose that house; it was by design. It

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44. By the time of closing argument, of couse, the jury was already aware that petitioner had been incarcerated in connection with the Curtis M. offense.

> wasntt by accident that Patricia [H.] was selected, again a neighbor, but now with a knife, and again a lone adult female with a child.
>
> . . . .

(19 Rep. Tr. at 2360, 2361, 2363.)

Gillingham objected to argument about Rodriguez' daughter being present when petitioner murdered her and moved for a mistrial. The Court denied the motion, stating that mention of Valaria Rodriguez was prohibited only in the guilt phase. (15 Rep. Tr. at 2365-66.)

Whether Valaria's presence was a "circumstance of the crime" under California Penal Code § 190.3(a) is a question of state law. Since the Supreme Court of California declined to definitively rule on this issue, McDowell, 46 Cal. 3d at 570-71, 250 Cal. Rptr. at 540, 763 P.2d at 1269, the Court will assume, for the sake of argument, that Valaria's presence may have been improperly considered by the jury. Petitioner can demonstrate no serious prejudice, however, since the prosecutor did not assert that her mere presence was itself a basis for a death sentence. Further, the jury was aware that, although present in the house, the child was far removed from the scene of the attack; the jury was not misled into believing that the child was forced to witness the killing of her mother. Thus, there is little likelihood that the jury's penalty verdict was influenced by the fact of Valaria's presence in the house at the time Rodriguez was murdered.

The prejudicial effect of this argument, if any, derived from the suggestion that petitioner chose to victimize Rodriguez because her young child was with her. The evidence supporting such a claim, however, was virtually non-existent and the inference based on the existing facts was extremely attenuated. "[P]rosecutors must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence." United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993); Gray, 876 F.2d at 1417. The evidence clearly established that Rodriguez and Patricia H. were attacked because they were women; the jury could also infer that they, in particular, were selected as victims because they were

unaccompanied by any other adult. The locations where they were assaulted could have supported an inference that the victims were chosen because of their proximity to petitioner's home. There was absolutely no evidence, however, suggesting that the two were selected as victims "by design," because a young child was present.[45] The prosecutor's argument here comes dangerously close to crossing the line ""demarcating permissible oratorical flourish from impermissible comment calculated to incite the jury against the accused."" Guam v. Ouichocho, 973 F.2d 723, 727 (9th cir. 1992) (quoting United states v. Lester, 749 F.2d 1288, 1301 (9th cir. 1984) (quoting United States v. Kopituk, 690 F.2d 1289, 1342-43 (llth cir. 1982))).

This lone comment by the prosecutor cannot have rendered the trial fundamentally unfair. If the argument was improper, it was buried in the context of other appropriate argument and did little more than invite the jury to draw an inference that had scant support in the evidence. The fleeting remark was not "so gross as to probably prejudice the defendant." Lester, 749 F.2d at 1301. Petitioner has failed to demonstrate that the prosecutor's comment was both legally impermissible and so prejudicial that the jury should have been instructed to disregard the comment.

## G. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE PROSECUTOR IMPUGNED PETITIONER'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS

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45. While petitioner's own statements expressed an intent to sexually assault a woman, he never suggested that he was also motivated by the fact that a child would be present. Nor did Patricia H. testify to any statements made by petitioner from which it could be inferred that her son's presence in the house was a part of petitioner's criminal plan. Indeed, to the contrary, Patricia H.'s testimony suggested that petitioner found the presence of the child a hinderance to his criminal scheme. Nor was there any indication that petitioner intended to or did cause harm to Rodriguezt child.

During closing argument at the penalty phase, the prosecutor stated:

> We don't hear much about the victim. And that's really a concern because it's like out of sight, out of mind. [¶] . . . Paula Rodriguez cannot be here to speak. [¶] Who does speak for her? [¶] Well, I suppose that it's better late than never, but I suggest that you must, as the conscience of this community speak for Paula Rodriguez.
>
> Mrs. McDowell came in here and pled for her son's life. [¶] We have in this procedure, and it should be so, the defense can present whatever it wishes in mitigation. It even has the right, and it has exercised that right, in having the defendant's mother come in and plead for his life. [¶] That is only one of the many rights that Mr. McDowell has participated in and exercised.
>
> I ask you what rights he gave Paula Rodriguez on May 20th, 1982. Did he allow someone to come in and plead for Paula's life? [¶] We know that someone was present. But two years old isn't old enough to plead for her mother's life. [¶] But Mr. McDowell wouldn't have listened to Valaria even if she had pled for her mother's life, because he did not listen to the pleas of Paul [H.] ten months before.

(19 Rep. Tr. at 2356, 2357, 2384-85.) Petitioner claims that the prosecutor's statements denigrated the exercise of his constitutional rights by comparing his rights with Rodriguez' rights.[46/]

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46. Petitioner originally claimed that the prosecutor's statements constituted improper victim impact argument. In light of Payne v. Tennessee, 501 U.S. 808 (1991), petitioner has disavowed reliance on a "victim impact" theory. As noted therein, "the Eighth Amendment erects no per se bar" to the introduction of evidence with respect to "the impact of the murder on the victim's family." Payne, 501 U.S. at 827. In so holding, the Supreme Court observed that, if the evidence or comment "is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. at 825.

The prosecutor's argument did not impermissibly impugn petitioner's exercise of his constitutional rights. The cases cited by petitioner address instances where the prosecution directly attacked the legitimacy and propriety of the due process protections afforded by the Constitution. In Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983) (per curiam), cert. denied, 469 U.S. 920 (1984), for example, the Ninth Circuit sharply condemned a prosecutor's "insidious attacks on [a defendant's] exercise of his constitutional right to counsel." Bruno, 721 F.2d at 1195. The Ninth Circuit denounced the prosecutor's suggestion that "the mere act of hiring an attorney [could be] probative . . . of guilt or innocence." Bruno, 721 F.2d at 1194. Similarly, "improper attacks on the integrity of defense counsel can cause prejudice." United States v. Baker, 10 F.3d 1374, 1416 (9th Cir. 1993), cert. denied, __ U.S. __, 115 S. Ct. 330 (1994). Such prosecutorial excesses cannot effectively be rebutted by defense attorneys' assurances of their own integrity. Nor is it easy to dispel the lay suspicion that the innocent have no need for an attorney. Cf. Bruno, 721 F.2d at 1194 ("[E]ven the most innocent individuals do well to retain counsel.").

It is, of course, "improper to urge that a criminal defendant's exercise of constitutional rights is a ground for discrediting his defense." Brooks v. Kemp, 762 F.2d 1383, 1411 (llth Cir. 1985) (en banc), vac'd and remanded on other grounds, 478 U.S. 1016 (1986), reinstated, 809 F.2d 700 (llth cir.) cert. denied, 483 U.S. 1010 1987). See also Darden v. Wainwright, 477 U.S. 168, 182 (1986) (improper to comment on "specific rights of the accused such as the right to counsel or the right to remain silent"). "Similarly, it is wrong to imply that the system coddles criminals by providing them with more procedural protections than their victims. A capital sentencing jury's important deliberation should not be colored by such considerations." Brooks, 762 F.2d at 1411. As the Ninth Circuit has observed, such prosecutorial expressions can "severely damage an accused's opportunity to present his case before the jury." Bruno, 721 F.2d at 1195.

Here, the prosecutor may be seen to have argued, in effect, the "injustice" of providing petitioner with procedural

protections when, in fact, petitioner had afforded no such rights to Rodriguez. Viewed in that light, the prosecutor's argument veered from its proper focus, that being, whether petitioner should be sentenced to death for his crimes. The argument did not, however, as argued by petitioner, clearly criticize petitioner for having taken advantage of the rights afforded him by the State. This kind of argument may perhpas be considered inflammatory, but it is not the kind of argument condemned by Bruno and Brooks. The inflammatory nature of the argument could have been effectively rebutted by defense argument. Petitioner has identified no reason why the courts need to monitor the type of prosecutorial argument that was presented here.

"'Every slight excess of a prosecutor does not require that a verdict be overturned and a new trial ordered. Prosecutorial misconduct does not require reversal unless the misconduct deprives the defendant of a fair trial.'" United States v. Sanchez-Robles, 927 F 2d 1070. 1077 (9th Cir. 1991) (quoting United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir. 1988)), cert. denied, 488 U.S. 866 (1988). These remarks, if they indeed amounted to misconduct, did not render the trial fundamentally unfair.

## H. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE PROSECUTOR MADE IMPROPER COMMENTS REGARDING DEFENSE TACTICS AND PETITIONER'S DEMEANOR

Petitioner takes issue with the following analogy made by the prosecutor during closing argument:

> Probably all of you have been to the zoo to see the lion. And you go to the zoo and you pass the lion's cage and there the lion is lying down. Beautiful animal, just lying there relaxing, and you admire the lion. [¶] And then you go home and you pick up the newspaper, and what do you find? You read about a woman who walked too close to that cage and that lion with his powerful legs and

> paws reached out and mauled that woman to death. [¶] And you sort of say, wait a minute. What is the real picture? What is the real lion? [§] Was it the lion that was lying there when I went by to see him at the zoo or is it the lion that has mauled to death this woman? As I say, you've seen this defendant in court for four and a half weeks. He's been well behaved, sitting next to a very nice young woman. [§] And you wonder to yourselves, well, gee, would that woman sit next to a man who could do such things? [§] But you realize that it serves the interest of this defendant to be just like that lion; it serves the interest of that lion to be well behaved when he's not hungry and when his fate is being determined. [¶] Now, I ask you, is it the man you've seen in this courtroom for more than five weeks, is that the true picture of the defendant? Or is it what was done to Paula Rodriguez.

(19 Rep. Tr. at 2358-59.) Petitioner contends that these remarks (1) unfairly compared him to a wild beast; (2) improperly commented on his courtroom demeanor; and (3) improperly maligned defense tactics by suggesting that petitioner's well-mannered courtroom demeanor was a calculated sham.

Petitioner's first criticism is entirely without merit. "[I]n extreme circumstances, a prosecutor's use of 'unnecessary, vindictive, and harsh language' may require reversal where the remarks are 'so gross as probably to prejudice the defendant, and the prejudice was not neutralized by the trial judge.'" United States v. Rewald, 889 F.2d 836, 861 (9th Cir. 1989) (quoting United States v. Biraes, 723 F.2d 666, 671-72 (9th Cir. 1984)), as amended, 902 F.2d 18 (9th Cir. 1990), cert. denied, 498 U.S. 819 (1990). The prosecutor's language here was not excessive or inflammatory. Unlike the petitioner in Darden, petitioner here was not denounced as an animal. Darden, 477 U.S. at 181 nn.11,12. The prosecutor used an analogy to differentiate between petitioner's in-court and out-of-court behavior. The reference to a caged lion did not include any

inappropriate invective. This aspect of the remarks was not improper.

Petitioner's second complaint concerning Gillingham's reference to his courtroom demeanor is similarly meritless. Petitioner contends that pursuant to United States v. Schuler, 813 F.2d 978 (9th Cir. 1987), the prosecutor's argument was improper. In Schuler, the Ninth Circuit held that "a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause" based on "the right not to be convicted except on the basis of evidence adduced at trial." Id. at 981. The court noted that the defendant's courtroom demeanor was not a matter of record evidence and, moreover, that "[h]is courtroom behavior off the witness stand was legally irrelevant to the question of his guilt." Id. at 980. The court concluded that "prosecutorial comment on a defendantts non-testimonial behavior may impinge on that defendantSs fifth amendment right not to testify." Id. The court recognized that jurors were unlikely to perceive such a remark as a direct comment on a defendant's failure to testify, but expressed concern that:

> such statements by the prosecutor during trial, or the fear of such statements in closing argument, will tend to eviscerate the right to remain silent by forcing the defendant to take the stand in reaction to or in contemplation of the prosecutor's comments. In effect the defendant would be compelled to testify to explain any actual or possible behavior that the prosecutor might bring to the jury's attention. While this pressure to testify may well be the exception, there is no reason for use of such comments that would justify even a slight opening of the door to an invasion of constitutional rights.

Id. at 982.

The court concluded "[w]hen, as here, the prosecutor describes the courtroom behavior of a defendant who has not testified, and then goes on to tell the jury that it may consider that behavior as evidence of guilt, the prosecutor violates those rights." Id. (quoting United states v. Carroll, 678 F.2d 1208, 1210 (4th Cir. 1982)).

Schuler is inapposite here. Schuler was premised on the fact that the prosecutor's argument treated the defendant's courtroom demeanor as character evidence that, if offered as evidence at trial, would have been inadmissible under Federal Rule of Evidence 404. Schuler, 813 F.2d at 980.[47] Here, the prosecutor was not suggesting that petitioner's courtroom demeanor was in any way relevant to the jury's sentencing decision. To the contrary, he was attempting to dissuade the jury from considering petitioner's calm demeanor in the courtroom as counterbalancing against a sentence of death. Since the prosecutor was affirmatively arguing to the jury that it should not consider petitioner's courtroom demeanor, his comments did not run afoul of Schuler.

The third criticism is similarly unfounded. As stated, the prosecution should not attempt to attack the propriety of a defendant's exercise of his constitutional rights. Bruno, 721 F.2d at 1194-95. Nor is it appropriate to malign the integrity of defense counsel. Baker, 10 F.3d at 1416 (citing Bruno, 721 F.2d at 1195). However, the remarks here did not suggest that Gillingham, or defense counsel in general, was unethical or untrustworthy. The comments do no more than rebut an alleged defense tactic.[48] It is entirely appropriate, however,

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47. Although, as recognized in Schuler, "different considerations, including general character, are relevant" at the sentencing stage, Schuler, 813 F.2d at 981 n.3, in California's capital sentencing trials, the prosecution's case for aggravation is limited to evidence relevant to the listed factors [in California Penal Code § 190.3]." People v. Boyd, 38 Cal. 3d 762, 775, 215 Cal. Rptr. 1, 11, 700 P.2d 782, 792 (1985). In California, character evidence can only be used to demonstrate a particular mitigating trait or, by the prosecution, to rebut a claim that the mitigating trait exists. People v. Ramirez, 50 Cal. 3d 1158, 1193, 270 Cal. Rptr. 286, 309, 791 P.2d 965, 988 (1990).

48. There is no evidence in the record indicating that, in fact, petitioner was seated next to a woman throughout the trial. As noted by the Ninth Circuit, "[i]t is very difficult . . . to review an issue that is not grounded in the record. If counsel consider such [a fact] to be significant, he or she should ask the trial court to have it included in the record." United States v.

for the prosecution to attack the defense theories, tactics, and strategies. United States v. Santiago, 46 F.3d 885, 892 (9th cir.) (the circuit "has [previously] upheld comments on a defense 'tactic'" (quoting United States v. Kessi, 868 F.2d 1097, 1106 (9th Cir. 1989)), cert. denied, _ U.S. _ , 115 S. Ct. 2617 (1995).

## I. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE PROSECUTOR ARGUED THAT THE ABSENCE OF POTENTIALLY MITIGATING CIRCUMSTANCES CONSTITUTED AGGRAVATING CIRCUMSTANCES

Petitioner also contends that his constitutional rights were violated at the penalty phase when the prosecutor argued that the absence of evidence supporting three mitigating factors, specifically factors (d), (h) and (j), set forth in California Penal Code Section 190.3,[49] should be considered factors in

Schuler, 813 F.2d 978, 980 (9th Cir. 1987).

49. The letter references in this section refer to letters designating factors in California Penal Code Section 190.3. The jury was instructed in terms of a slightly modified standard jury instruction wherein the letter references differ, but the substance of the factors is the same. Thus, the pertinent code factors and their equivalents in the court's instructions are as follows:

(d) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance (instructions factor (c));

(h) whether or not at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication (instructions factor (g)); and

(j) whether or not the defendant was an accomplice to the offense and participation in the commission of the offense was relatively minor (instructions factor (I).

Cal. Penal Code § 190.3

aggravation.[50] With respect to factor (d), the prosecutor reviewed the evidence presented by the petitioner at the penalty phase and concluded, "It is [the] People's contention that the fact that there was no influence of a strain, mental or emotional disturbance, is a factor in aggravation, and you should give it the proper weight." (19 Rep. Tr. at 2370.) With respect to factor (h), the prosecutor pointed out that the petitioner had failed to produce psychiatric testimony despite his right to consult a psychiatrist and that the absence of psychiatric testimony suggested that the defendant was not suffering from any mental disease or defect. He concluded as to (h) that "this is a factor in aggravation because it tells you the degree to which Mr. McDowell planned out and foresaw and designed a scheme to meet his sexual urgings on May 20, 1982." (19 Rep. Tr. at 2379.) Finally, with respect to factor (j), the prosecutor, in considering whether the defendant was an accomplice to or only a minor participant in the crime, stated, "he wasn't an accomplice, he wasn't a minor, and there was no mitigation. Mr. McDowell is the sole mover. And as the sole mover, you'll be instructed that you can consider that fact." (19 Rep. Tr. at 2374.)

Under California law, factors (d), (h) and (j), which are factors (c), (g) and (i) in the court's instructions, can only mitigate. See People v. Hamilton, 48 Cal. 3d 1142, 1184, 259 Cal. Rptr. 701, 726, 774 P.2d 730, 755 (1989). Since the decision of the Supreme Court of California in People v. Davenport, 41 Cal. 3d 247, 221 Cal. Rptr. 794, 710 P.2d 861 (1985), it has been well established that the absence of evidence as to these factors does not render these factors aggravating and that it is improper for tne prosecutor to argue that it does. Davenport, 48 Cal. 3d at 288-290, 221 Cal. Rptr. at 821, 710 P.2d at 888. See also,

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50. Petitioner also claims that the prosecutor improperly argued that the absence of mitigating evidence supporting factors (e), (f) and (g) should be considered factors in aggravation. However, it is clear from the state court record that the prosecutor did little more than "properly point to the absence of mitigating evidence in these categories." People v. Whitt, 51 Cal. 3d 620, 654, 274 Cal. Rptr. 252, 272, 798 P.2d 849, 869 (1990). Accordingly, there was no error in the argument with respect to these factors.

People v. Marshalls, 50 Cal. 3d 907, 944, 269 Cal. Rptr. 269, 289, 790 P.2d 676, 696 (1990) ("[A]ggravation is not established by absence of mitigation in the form of extreme mental or emotional disturbance, domination, [or] relatively minor participation"). Notwithstanding the Davenport Court's intention that its holding have only prospective application -- that such improper argument "should not in the future be permitted," Davenport, 41 Cal.16 3d at 290, 221 Cal. Rptr. at 821, 710 P.2d at 888, -- the Supreme Court of California has nevertheless addressed improper Davenport argument and its potential for prejudice in pre-Davenport cases. See, e.g., People v. Whitt, 51 Cal. 3d 620, 655 n.27, 274 Cal. Rptr. 252, 273, 798 P.2d 849 (1990); Hamilton, 48 Cal. 3d at 1184, 259 Cal. Rptr. at 726, 774 P.2d at 755 (and cases cited therein). Indeed, although Davenport had not yet been adjudicated at the time of this case, the issue of-prejudice caused by the prosecutor's Davenport argument in this case was raised and determined in the Supreme Court of California's affirmance of the defendant's death sentence. McDowell, 46 Cal. 3d at 572-574, 250 Cal. Rptr. at 542-43, 763 P.2d at 1281. Accordingly, the Court is obligated to review the prosecutor's Davenport argument and to determlne whether it violated the petitioner's constitutional rights.[51/]

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51. The United States Supreme Court's decision in Tuilaepa v. California, __ U.S. __ , 114 S. Ct. 2630 (1994), holding that California's use of a single list of sentencing factors at the penalty phase does not violate the defendant's Eighth Amendment rights despite the failure of the list to direct the jury whether to weigh the factors on the side of mitigation or aggravation, might constitutionally validate Davenport argument despite California's determination that such argument is improper. In Tuilaepa, the Supreme Court reaffirmed that the Eighth Amendment's requirement that the selection aspect of the capital decisionmaking process -- that is, the decision as to who among defendants eligible for the death penalty should in fact receive that sentence -- be "an individualized determination on the basis of the character of the individual and the circumstances of the crime," is met "when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." Tuilaepa, 114 S. Ct. at 2635 (citing Zant v. Stephens, 462 U.S. 862, 879 (1983)). The Court concluded that states may adopt capital sentencing processes that "rely upon the jury, in its sound judgment, to exercise wide discretion," and that do not

Although "improper" under California law, no court has held that Davenport argument amounts to constitutional error. Nor has the Supreme Court of California intimated that its conclusion in Davenport was compelled by constitutional concerns. See, e.g., People v. Brown, 46 Cal. 3d 432, 456, 250 Cal. Rptr. 604, 620, 758 P.2d 1135, 1150 (1988) ("[we] are aware of no authority indicating that prosecutorial argument contrary to Davenport amounts to a federal constitutional violation."). Although prosecutorial argument which is clear misconduct, such as commenting on a defendant's post-arrest silence, U.S. v. Baker, 999 F.2d 412, 416 (9th Cir. 1993), or his failure to testify, U.S. v. Tarazon, 989 F.2d 1045, 1051 (9th Cir. 1993), has been held to violate the defendant's rights to due process under the Fourteenth Amendment and to freedom from self-incrimination under the Fifth Amendment, a prosecutor's suggestion that the absence of mitigating factors be construed as evidence in aggravation has never been held to implicate similar constitutional concerns. That such prosecutorial argument is not constitutional error is bolstered by the United States Supreme Court's conclusion in Tuilaepa v. California that California's capital sentencing process, permitting "the prosecution (as well as the defense) to make wide-ranging arguments about whether the defendant deserves the death penalty" and allowing the jury wide discretion to weigh sentencing factors without instruction as to how each factor should be weighed does not offend the Eighth Amendment. Tuilaepa, 114 S. Ct. at 2638. Recognizing that the State of California now deems such argument

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instruct the jury how to weigh or evaluate particular factors in the capital sentencing decision. Id. at 2636, 2638.

It may well follow that the Eighth Amendment permits the prosecutor, as well-as the defense attorney, wide latitude to argue that mitigating and aggravating factors, or the absence thereof, should be weighed or viewed in a particular manner. The prosecutor's argument in this case, under this view, clearly would have permitted the jury to consider relevant mitigating evidence and thus may have met the requirements of the Eighth Amendment in capital punishment cases. However, because even under Davenport the prosecutor's "improper" argument cannot be said to have misled the jury, this view is not essential to the Court's holding.

"improper," the Court is unwilling to hold that such "impropriety" is of constitutional dimensions. Even if the prosecutor's Davenport argument were to be viewed as constitutional error, however, the record demonstrates that such error was harmless in this case.

First, in affirming the imposition of the death penalty in this case, the Supreme Court of California concluded that although the prosecutor's arguments with respect to factors (d), (h) and (j) were improper under Davenport, such impropriety was harmless-in this case. McDowell, 46 Cal. 3d at 574, 250 Cal. Rptr. at 543, 763 P.2d at 1281. The court reached this conclusion in part because defense counsel took issue with the prosecutor's position and vigorously argued that it was impermissible to consider the absence of mitigation factors as factors in aqqravation. He emphasized that the law required consideration only of factors that are "applicable" and that many of the factors listed, such as mental disease or defect, were not. McDowell, 46 Cal. 3d at 573, 250 Cal. Rptr. at 542, 763 P.2d at 1281. In light of defense counsel's clarifying argument, the trial court's instructions to weigh any and all evidence of mitigating circumstances and the fact that the jury was well aware of and free to consider the underlying facts presented during the guilt and penalty phases of the trial, particularly the history of serious abuse petitioner suffered at the hands of his father, the Supreme Court of California concluded that any improper Davenport argument was harmless under the facts of this case. 46 Cal. 3d at 574, 250 Cal. Rptr. at 543, 763 P.2d at 1281. The jury note for clarification which showed that the jurors did in fact consider the evidence of these mitigating factors during their deliberations further serves to buttress the Supreme Court of California's conclusion.

Second, since its consideration of this case, the Supreme Court of California has in several cases considered tne impact of Davenport argument and has "declined to find prejudicial effect . . . ." Hamilton, 48 Cal. 3d at 1184-85, 259 Cal. Rptr. at 727 (citing Bonin, 46 Cal. 3d at 702, 250 Cal. Rptr. at 710, 758 P.2d at 1241; People v. Keenan, 46 Cal. 3d 478, 510, 250 Cal. Rptr. 550, 570, 758 P.2d 1081, 1101 (1988); People v. Brown, 46 Cal.

3d 432, 456, 250 Cal. Rptr. 604, 620, 758 P.2d 1138, 1150 (1988); People v. Ghent, 43 Cal. 3d 739, 775-776, 239 Cal. Rptr. 82, 106, 739 P.2d 1250, 1274 (1987)). In a case in which the prosecutor, in his closing argument, referred to a chart that listed the absence of mitigating factors as factors in aggravation, and the jury had the chart with them during their deliberations, the Supreme Court of California held that it was reasonable to assume that the jury was not misled about its duty to weigh the applicable aggravating and mitigating factors in determining the appropriate penalty. See Hamilton, 48 Cal. 3d at 1184, 259 Cal. Rptr. at 726-727, 774 P.2d at 756. Moreover, the court in Hamilton held that in light of its findings that the balance of evidence was overwhelmingly in favor of aggravation, that the jury was properly instructed and that the capital crimes themselves were exceptionally brutal, there was "no reasonable possibility the prosecutor's improper argument influenced the penalty verdict." 48 Cal. 3d at 1184-85, 259 Cal. Eptr. at 727, 774 P.2d at 756.

In this case, the jury was twice instructed concerning its obligation to consider and weigh all of the mitigating and aggravating evidence in reaching its sentencing decision. The jury was also instructed to consider "any other aspect of the [petitioner's] character or personal history" that might warrant a sentence less than death, such as evidence that petitioner suffered an extremely abusive childhood. Finally, defense counsel effectively neutralized any potential prejudice flowing from the prosecutor's argument by vigorously contending that the absence of evidence of mitigating factors could not be taken as evidence in aggravation. Moreover, the evidence weighing in favor of aggravation was very strong. Thus, the risk that the prosecutor's improper argument affected the penalty verdict is at best minimal and likely nonexistent.

## J. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE JURY'S DISCUSSION OF THE EFFECT OF IMPOSING VARIOUS SENTENCES

Petitioner alleges that during the penalty phase deliberations, at least one of the jurors improperly introduced extraneous and prejudicial information into the jury deliberations, and that the jury relied on this information in imposing its sentence. In support of this claim, petitioner proffers the declaration of one of the jurors who participated in the deliberations.

In this declaration, the juror states that the jury began deliberating on Wednesday, and by late Thursday or early Friday, she was the "holdout," while the rest of the jurors favored a death sentence. She declares that several jurors were impatient to agree on the sentence, and she specifically recalls one juror being upset because the deliberations were preventing him from going fishing. By Monday, the jurors were very angry and impatient. Finally, one of the jurors stated that this "holdout" juror should vote for death because if petitioner received a sentence of life without parole, he would be released in only ten to fifteen years because a sentence of life without parole did not necessarily guarantee that petitioner would actually serve a sentence of life without parole. The same juror stated further that if petitioner received a death sentence he would never be executed because no executions were being performed in California, but that such a death sentence would ensure that petitioner would be incarcerated for the remainder of his life.

The "holdout" juror describes these statements as being "pivotal" as she was concerned with sparing petitioner's life while keeping him out of society, and claims that these statements ultimately led her to vote for a sentence of death. She maintains that she never believed that petitioner should be executed, and that she would not have voted for a death sentence had the other juror not represented to her that death sentence would effectively mean that petitioner would be incarcerated for life without being executed. Premising his argument on a claim that the information concerning sentences of life without parole constituted impermissible extraneous evidence, petitioner contends that the allegations in the juror's declaration demonstrate jury misconduct requiring a new penalty phase trial.

In raising this issue, petitioner incorrectly assumes the admissibility of the "holdout" juror's statements regarding the events that transpired during the course of jury deliberations. See United States v. Maree, 934 F.2d 196, 201 (9th Cir. 1991) (admissibility of juror's statements is a threshold question). In fact, Federal Rule of Evidence 606(b), which governs the admissibility of juror testimony to impeach a verdict, unquestionably bars the admission of the juror's statements regarding the manner in which the discussion affected her decision to vote for death:[52]

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of deliberations or to the effect of anything upon his or any juror's minds or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter which he would be precluded from testifying be received for these purposes.

Fed.R.Evid. 606(b) (emphasis added). Thus, the threshold issue facing this Court is whether the juror's comments about the "true meaning" of the respective life without parole and death sentences constitute the type of extraneous information that is admissible under Rule 606(b) (emphasis added). Thus, the threshold issue facing this Court is whether the juror's comments about the "true meaning" of the respective life without parole and death sentences constitute the type of extraneous information that is admissible under Rule 606(b).

The Seventh Circuit faced a situation virtually identical to the one presented in this case in Silagy v. Peters, 905 F.2d 986,

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52. Pursuant to Federal Rule of Evidence 1101(e), the Federal Rulesof Evidence apply to habeas corpus cases brought under 28 U.S.C. § 2254.

1008-1009 (7th Cir. 1990). Like this case, Silagy involved a death-sentenced prisoner's federal habeas corpus petition alleging that during penalty phase deliberations, one of the jurors explained his understanding of state sentencing laws to the other jurors. Id. at 1008. In particular, the juror stated his belief that a life sentence would result in the defendant serving only five to seven years in prison, while a death sentence would ensure that the defendant would serve more than seven years in prison without ever being executed. Citing Federal Rule of Evidence 606(b), the court in Silagy held that discussion involving "a juror's erroneous ideas" was not properly admissible to impeach a jury verdict. Id. at 1009. Moreover, the court voiced its belief that Rule 606(b) was intended to prevent the constant scrutiny of jury verdicts by prohibiting inquiry into "the jury's deliberative process, including arguments, statements, discussions, mental and emotional reactions, and votes, in the absence of a claim of external influence." Id. (quotinq United States v. Ford, 840 F.2d 460, 465 (7th Cir. 1988) (emphasis added in Silagy)).

Silagy is but one example of the distinction drawn by courts between extraneous jury information, which is admissible under Rule 606(b), and intra-jury discussions, which are not. In a habeas case involving a prisoner sentenced to death, the Eleventh Circuit denied request to conduct discovery based on an offer of proof that two jurors voted "guilty" despite believing the defendant was insane because they assumed that a "not guilty by insanity" verdict would be less effective in keeping the defendant away from society. See Fulghum v. Ford, 850 F.2d 1529, 1535 (llth Cir. 1988), cert. denied, 488 U.S. 1013 (1989). The court in Fulghum reasoned that the jurors' statements were related to the jurors' mental processes in reaching a verdict, and thus were not admissible to challenge the verdict. Id. The Fulghum court relied in part on United States v. D'Angelo, 598 F.2d 1002 (5th Cir. 1979), which involved a jury note sent after a verdict which indicated that the jury may have convicted the defendant without finding all of the elements necessary for the conviction. In rejecting the defendant's attack on the verdict, the court stated:

> A jury has an obligation to follow the law as it is given by the trial court, but it is a peculiar facet of the jury institution that once a verdict is rendered, no judicial inquiry is permitted into the jury's deliberative process to determine if in fact the court's instructions were properly followed . . . . The sanctity of the verdict may be impugned only by evidence of improper external influences on the jury's decision.
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> . . . .
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> Inquiry into the conscience or compliance of jurors, by contrast, requires inquiry into a matter that essentially inheres in the verdict . . . and is thus strictly forbidden.

D'Angelo, 598 F.2d at 1004 (citations omitted).

Courts have long distinguished between external jury influences, which can lead to distorted jury deliberations and possible injustice, see United States v. Campbell, 684 F.2d 141, 151 (D.C. Cir. 1982), and intra-jury discussions. Examples of extraneous jury influences include exposure of the jury to news items about the case, consideration by the jury of evidence not admitted in the case, communications between third parties and jurors about the case, and pressure or partiality from the court. See Government of the Virgin Islands v. Gereau, 523 F.2d 140, 149-50 (3rd Cir. 1975), cert. denied, 424 U.S. 917 (1976). Intra-jury discussions, on the other hand, merely reflect the "give-and-take" that has long been the hallmark of jury deliberations. Campbell, 684 F.2d at 151.

In the present case, petitioner does not allege any external influence on the jury. At best, petitioner might argue that the jurors ignored or misinterpreted the jury instructions informing them that the penalties available were sentences of death or life without the possibility of parole. As D'Angelo makes clear, however, this court cannot consider such evidence. See also United States v. Brady, 579 F.2d 1121, 1127 (9th Cir. 1978) (the court is required to assume that a jury follows the instructions). Petitioner's claim, then, is one involving intra-jury discussions.

The Ninth Circuit has noted the distinctions between external jury influence and intra-jury discussions, and has often

followed the rule that intra-jury factors cannot lead to impeachment of a jury verdict. See, e.g., United States v. Bagnariol, 665 F.2d 877, 887 (9th Cir. 1981) ("intrinsic jury processes will not be examined on appeal and cannot support reversal"); United States v. Pimentel, 654 F.2d 538, 542 (9th Cir. 1981) ("Testimony of a juror concerning . . . conduct during deliberation is not admissible. Juror testimony is admissible only concerning facts bearing on extraneous influences on the deliberation, in the sense of overt acts of jury tampering"); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1579 (9th Cir. 1989) (Rule 606(b) "prohibits the use of juror testimony to impeach a verdict when that testimony relates to intrinsic matters--that is, the internal mental processes by which the verdict was reached") (emphasis in original)), cert. denied, 497 U.S. 1003 (1990).

The Ninth Circuit's analysis in Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993) is instructive. In Morgan, the court held that Rule 606(b) of the Federal Rules of Evidence barred admission of a juror's post-verdict declarations that during deliberations in a civil rights case, the jury discussed using the verdict to "send a message to City Hall" and speculated about the cost of plaintiff's attorney'f fees and whether the damages should cover the fees. Id. at 1261. The Morgan court termed these discussions "subjective thoughts" and noted that extraneous information must ke carefully separated from "'the general knowledge, opinions, feelings, and bias that every juror carries into the jury room.'" Id. (quotinq Hard v. Burlington Northern R.R. Co., 870 F.2d 1454, 1461 (9th Cir. 1989)). Thus, the "subjective thought" aspect of petitioner's current allegations, similar to those analyzed in Morgan, differentiates this case from cases where the Ninth Circuit has found that juror behavior constituted an extraneous influence. See e.g. Gibson v. Clanon, 633 F.2d 851, 855 (9th Cir. 1980) (extraneous influence found when one juror consulted an encyclopedia and another looked at a medical dictionary, then both shared the information with the remaining jurors); Marino v. Vasquez, 812 F.2d 499, 505 (9th Cir. 1987) (juror consulted a dictionary to define "malice"); Bayramoglu v. Estelle, 806 F.2d 880, 882 (9th Cir. 1986) (juror

called a law librarian during deliberations to inquire about the differences, including penalties, between first and second degree murder); U.S. v. Navarro-Garcia, 926 F.2d 818, 823 (9th Cir. 1991) (juror put 300 pounds in his car trunk to determine if a suspected drug courier would have noticed 300 pounds of marijuana in her trunk);[53] Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988) (deputy sheriff escorting the jurors told two jurors that the defendant "had done something like this before"); United States v. Bagnariol, 665 F.2d 877, 883-884 (9th Cir. 1981) (juror consulted a reference book in a library).

The Court is not persuaded that Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993), compels a different result. In Jeffries, another death penalty case, petitioner alleged that he was denied a fair trial because one juror informed the other jurors that Jeffries was a convicted bank robber. Id. at 1189.[54] Two jurors submitted declarations stating that they had heard the other juror make the statement. Id. The accused juror denied making the statement, and eight other jurors claimed that they never heard anything about a prior bank robbery. Id. at 1190.[55] Relying on Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988), the court remanded for a factual determination of the truth of the juror affidavits. Jeffries, 5 F.3d at 1198.[56] The

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53. Petitioner relies heavily on Navarro-Garcia, emphasizing that the Ninth Circuit remanded the claim for an evidentiary hearing on the allegation that, during deliberations, a juror stated that his car drags lower when his children are in the backseat. Petitioner misunderstands the import of the Ninth Circuit's holding. The court did not require a hearing simply to determine whether the matter was discussed, but rather to determine whether the juror was relating a common occurrence or whether he conducted an experiment during deliberations by putting his children in the backseat. Navarro-Garcia, 926 F.2d at 822.

54. The trial court had excluded evidence of the prior conviction.

55. The decision makes no mention of how the juror learned of the prior conviction, if indeed such knowledge existed.

56. In Dickson, the court granted habeas corpus relief because a sheriff escorting the jury told two jurors that the defendant had previously done something similar to that for which he was being tried. 849 F.2d at 406.

Jeffries court held that the fact that the information in Dickson had come from an outside source was irrelevant. The court stated:

> The fact that the extrinsic information came from a juror's personal knowledge rather than from an outside source has no bearing on our analysis. We have previously recognized that juror's personal knowledge of information concerning the defendant or the defendant's alleged crime constitutes impermissible extrinsic evidence. United States v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir. 1991); see also United States v. Howard, 506 F.2d 865, 867 (5th Cir. 1975)

Jeffries, 5 F.3d at 1190 n.2.

Jeffries does not support petitioner's argument that the jury discussions with which he takes issue involved impermissible extraneous evidence. Petitioner has not succeeded in supporting his claim that the intra-jury discussions regarding the meaning of various sentences were discussions of impermissible extraneous information in violation of petitioner's constitutional rights.

## K. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTOR'S ARGUMENT AND THE JURY INSTRUCTIONS RELATING TO IMPOSITION OF A DEATH SENTENCE

At the penalty phase, the jury was instructed to consider ten aggravating and mitigating factors. They were not told which were aggravating and which were mitigating. The jury was further instructed: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." (19 Rep. Tr. at 2420-21.) Additionally, the prosecutor reiterated this particular portion of the jury instructions, stating:

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall--and I stress the word "shall" impose a sentence of death.
>
> . . . .

> So you cannot say I'd like to vote for the death penalty and then find that mitigating circumstances outweigh aggravating.
>
> . . . .
>
> And for the same reason, you cannot find that aggravating circumstances outweigh mitigating and vote for life without the possibility of parole because the law says "shall."
>
> . . . .
>
> Now, if you put this in formula, mathematical formula, if the aggravating circumstances outweigh, are greater than the mitigating circumstances, that is equal to death. You'll be instructed that that is the law. So, now you have a formula.

19 Rep. Tr. at 2352, 2353, 2381.)

In this final argument, petitioner asserts that his right to a fair penalty determination was denied because the jury was led to believe that the sentencing was formulaic, allowing the jury no discretion to conclude that life without parole was the appropriate sentence if it found that the aggravating circumstances outweighed the mitigating circumstances.

The United States Supreme Court has rejected petitioner's claim. In Boyde v. California, 494 U.S. 370, 377 (1990), the Court held that the "shall impose" language used by trial courts in capital cases in California does not prevent the jury from conductinq an individualized assessment, and thus does not violate the constitutional requirement of individualized sentencing. See also Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990) (denying a constitutional challenge to similar "mandatory" language in Pennsylvania's capital sentencing statute because the Constitution's requirement of individualized sentencing is met by allowing the jury to consider all relevant mitigating evidence).

Likewise, petitioner's contention that the prosecutor's argument furthered a constitutionally erroneous interpretation of the sentencing instructions is without merit. "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court . . . [and] are not to be judged as

having the same force as an instruction from the court." Boyde, 494 U.S. at 384-85.

In sum, the instructions given to the jury in this case were constitutionally adequate, and there is no reasonable likelihood that the prosecutor's stressing of the word "shall" caused the jury to interpret the instructions in a constitutionally impermissible manner. Petitioner's trial was not rendered fundamentally unfair either by the instructions given to the jury or the prosecutor's choice of words in his closing argument.

## V. CONCLUSION

For all of the reasons discussed above, the Court DENIES petitioner's amended petition for writ of habeas corpus.

This Order constitutes a final disposition of this petition by the Court. Consistent with the Order, the Court vacates the stay of execution previously granted. If petitioner applies for a certificate of probable cause and the certificate is granted, the Court will order another stay of execution which will remain in effect until the Court of Appeals acts upon the appeal or the order to stay the execution. See Local Rule 26.8.7(f).

IT IS SO ORDERED.

DATED: November 21, 1995.

(SIGNED)

_____

Mariana R. Pfaelzer
United States District Judge

# Appendix E

F I L E D

AUG 22 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| CHARLES E. MC DOWELL, JR., | No. 96-99000 |
| Petitioner-Appellant, | D.C.No. CV 90-04009-MRP |
| v. | ORDER |
| ARTHUR CALDERON, Warden of the California State Prison at San Quentin, | |
| Respondent-Appellee. | |

Before: HUG, Chief Judge.

The parrties hould be prepared to discuss any implications of Buchanan v. Angelone, 103 F.3d 344 (4th Cir. 1996) cert. granted in part, 117 S. Ct. 1551 (1997).

# Appendix F

FILED

JAN 28 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| CHARLES E. MC DOWELL, JR., | ) | No. 96-99000 |
| | ) | |
| Petitioner-Appellant, | ) | D.C.No. CV 90-04009-MRP |
| | ) | |
| v. | ) | |
| | ) | ORDER |
| ARTHUR CALDERON, Warden of the California State Prison at San Quentin, | ) | |
| | ) | |
| Respondent-Appellee. | ) | |

TROTT, Circuit Judge:

Respondent Calderon's Motion for Third Stay of Mandate to and including February 22, 1998, is GRANTED. The mandate is ordered held accordingly. This court shall not entertain any further requests to hold the mandate.

SO ORDERED.

*ORDER DATED DECEMBER 29, 1997*

F I L E D

DEC 29 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| CHARLES E. MC DOWELL, JR., | No. 96-99000 |
| Petitioner-Appellant, | D.C.No. CV 90-04009-MRP |
| v. | ORDER |
| ARTHUR CALDERON, Warden of the California State Prison at San Quentin, | |
| Respondent-Appellee. | |

TROTT, Circuit Judge:

Respondent Calderon's motion to the mandate to 30 days to and including January 30, 1998, is GRANTED. The mandate is ordered held accordingly.

SO ORDERED.

*ORDER DATED DECEMBER 3, 1997*

F I L E D

DEC 3 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| CHARLES E. MC DOWELL, JR., | ) | No. 96-99000 |
| Petitioner-Appellant, | ) | D.C.No. CV 90-04009-MRP |
| v. | ) | ORDER |
| ARTHUR CALDERON, Warden of the California State Prison at San Quentin, | ) | |
| Respondent-Appellee. | ) | — |

TROTT, Circuit Judge:

The motion for a stay of mandate through December 31, 1997 is GRANTED so that Respondent-Appellee may consider a petition for certiorari to the Supreme Court.

Supreme Court, U.S.
FILED
MAR 25 1998
CLERK

(3)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 1414

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ARTHUR CALDERON, Warden,

Petitioner,

v.

CHARLES E. McDOWELL, JR.,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# RESPONDENT'S BRIEF IN OPPOSITION AND MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* *DEATH PENALTY CASE*

---

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Counsel of Record for Respondent
Charles E. McDowell, Jr.

37 pp

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 1414

---

ARTHUR CALDERON, Warden,

Petitioner,

v.

CHARLES E. McDOWELL, JR.,

Respondent.

---

---

**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

Respondent Charles E. McDowell, Jr., by his undersigned counsel, asks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*, pursuant to Rule 39. Respondent has been represented by the undersigned court-appointed attorney in the United States District Court for the Central District of California and in the United States Court of Appeals for the Ninth Circuit, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

DATED: March 25, 1998

Andrea G. Asaro
Counsel of Record for Respondent
Charles E. McDowell, Jr.

## QUESTIONS PRESENTED

1. At the penalty phase of Respondent's capital trial the jury sent the trial judge a note stating that the 11-juror, pro-death majority had concluded that the mitigating circumstances Respondent had presented did not constitute "either testimony or evidence that should be considered." Although the jury's note requested additional guidance, the trial court gave no supplemental instructions. Under these circumstances, did the Ninth Circuit Court of Appeals, in its *en banc* decision, correctly hold, consistent with Boyde v. California and Bollenbach v. United States, that the jury's note disclosed a violation of Eddings v. Oklahoma, and that the trial court erred by failing to correct the jury's misunderstanding?

2. Does the Ninth Circuit Court of Appeals' *en banc* holding, that under Eddings v. Oklahoma Respondent was entitled to supplemental instructions to correct the jurors' stated intention to give Respondent's mitigating evidence no weight, announce a "new rule" within the meaning of Teague v. Lane?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 1414

---

ARTHUR CALDERON, Warden,

Petitioner,

v.

CHARLES E. McDOWELL, JR.,

Respondent.

---

Respondent Charles E. McDowell, Jr., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's *en banc* opinion in this case. That opinion is reported at McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997).

## STATEMENT OF THE CASE

Respondent Charles E. McDowell, Jr. ("Respondent" or "McDowell") was convicted in California in 1984 of one count each of murder, attempted murder, attempted rape and burglary and was sentenced to death. At the penalty phase of McDowell's trial the prosecutor presented evidence of a prior conviction for lewd and lascivious conduct and an uncharged alleged prior rape. Respondent's counsel presented testimony from several of McDowell's relatives, a former neighbor, a parole officer and a psychiatric nurse who testified that, in essence, McDowell had had an extraordinarily abusive childhood. McDowell

presented evidence that he had endured years of severe physical abuse at the hands of his father, who had openly engaged in incestuous relations with his daughter, Respondent's sister. See Order and Opinion of the United States District Court for the Central District of California, filed November 21, 1995 ("District Court Opinion"), pp. 6-9.[1/]

At closing argument the prosecutor argued that under California's statutory sentencing "formula" the aggravating circumstances outweighed the mitigating circumstances, which mandated a sentence of death. He argued, over defense counsel's objection, that inapplicable mitigating circumstances — particularly the absence of any expert psychiatric testimony that McDowell suffered any mental disorder or impairment — should be weighed as aggravating circumstances. District Court Opinion, pp. 68-70, 81; McDowell v. Calderon, 107 F.3d 1351, 1364-65 (9th Cir. 1997), amended and superseded in part by 116 F.3d 364 (9th Cir. 1997).

Defense counsel alluded to the testimony that McDowell had been physically beaten as a child and that his father had sexually molested his own daughter, but did not argue the mitigating import of the evidence his witnesses had presented, and made no reference to any of the statutory sentencing factors relevant to mitigation. District Court Opinion, pp. 41-42, n. 32.

The trial court instructed the jury, inter alia, to "consider, take into account, and be guided by" a list of 10 undifferentiated statutory sentencing factors, including "defendant's

---

[1/] The district court's Order and Opinion is not reported but is included in the Appendix submitted to this Court by Petitioner.

character or personal history," (CALJIC 8.84.1, 1984 Rev.),[2/] and gave the standard

---

[2/] The jury was instructed:

> In determining which penalty is to be imposed on defendant . . . you shall consider, take in to account, and be guided by the following factors if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (e) Whether or not the offense was committed under the circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> (h) The age of the defendant at the time of the crime.
>
> (i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any other aspect of the defendant's character or personal history that the defendant offers as a basis

(continued...)

instruction that "one mitigating circumstance may outweigh several aggravating circumstances, or one aggravating circumstance may outweigh several mitigating circumstances." (CALJIC 8.84.2). District Court Opinion, pp. 45-46. The instructions were all provided to the jury in writing. McDowell, supra, 130 F.3d at 838.

During their third day of deliberation the jury sent the trial judge the following note:

> We, the jury in the above entitled action, request the following:
>
> Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which [of the] following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.
> 2. Love/hate relationship with father/mother.
> 3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.
> 4. Religious extremes confused defendant.
> 5. Confusing sexual more's [sic] at home (incest), with mother condoning or aware of incest/abuse.
> 6. Accused of death of favorite sister.[3/]
> 7. Stress of divorce from family.
> 8. Rejection of mother's love during teen years.

---

[2/](...continued)
for a sentence less than death.

District Court Opinion and Order at 45-46. As given to the jury in this case statutory factor 190.3(k) was re-lettered as factor "(j)" because another statutory factor was deleted from the list by stipulation.

[3/] Evidence was presented that when he was a child McDowell's little sister was struck by a car and killed outside the family residence. District Court Opinion and Order, pp. 7-8.

Thank you.

McDowell, supra, 130 F.3d at 835; emphasis supplied by the Court.

Defense counsel urged the court to instruct the jury that the factors enumerated in the note should be considered mitigating circumstances. Id. at 836. The prosecutor forthrightly agreed that they were "proper factors to consider." Id. at 837-838. The trial court nonetheless declined to give any supplemental instruction. Instead of answering the jury's question the court merely referred the jury to an unspecified instruction from the original charge and reread the "weighing" instruction:

> You're asking me, in essence, to decide the case for you. You have been instructed as to the law and I hate to throw you out like this.
>
> But if you go back and read the instructions, in particular you have one instruction in which the mitigating and aggravating factors are listed.
>
> Then you have another instruction, the concluding instruction which reads as follows:
>
> "One mitigating circumstance may outweigh several aggravating circumstances or one aggravating circumstance may outweigh several mitigating circumstances. You shall give each the weight to which you find it to be entitled."
>
> Those are the two instructions that I think really apply. I would ask you to go back, reread those instructions. . . .

Id. at 836. The trial court then asked the foreman, "Does that answer your question for now?" The foreman immediately answered, "Yes, sir." Id. The jury resumed its deliberations that Friday afternoon and, after a weekend break, returned its sentence of death the following Monday. Id.

After exhausting his state appellate and post-conviction remedies Respondent sought habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Central District of California, which denied relief. On appeal to the United States Court of

Appeals for the Ninth Circuit a three-judge panel initially affirmed, unanimously, in a decision filed February 26, 1997. McDowell v. Calderon, 107 F.3d 1351 (9th Cir. 1997), amended and superseded in part by, 116 F.3d 364 (9th Cir. 1997). Respondent then filed a petition for rehearing with suggestion for rehearing *en banc*. On May 23, 1997 the Court issued an order amending its opinion, by deleting Judge Stephen S. Trott as concurring in the majority opinion and by adding his concurring and dissenting opinion. Judge Trott concurred in the majority's affirmance of the conviction but would have reversed Respondent's death sentence. McDowell v. Calderon, 116 F.3d 364 (9th Cir. 1997). Judge Trott concluded, in reliance on Boyde v. California, 494 U.S. 370 (1990), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), that because the trial court had failed to clarify or correct the jury's confusion and mistake regarding the mitigating evidence presented, there was a reasonable likelihood that the jury had not applied the instructions correctly and had not understood that they were to consider Respondent's mitigating circumstances in support of a sentence less than death. McDowell, 116 F.3d at 367-68. Judge Trott voted to accept the suggestion of rehearing *en banc*, which was granted by order filed July 18, 1997.

Following rehearing *en banc*, the Ninth Circuit, in a seven-to-four decision written by Judge Trott, vacated Respondent's death sentence and remanded to the district court with instructions to grant the writ and to order a new penalty phase trial in sate court.

## SUMMARY OF ARGUMENT

This is a capital case. During their deliberations at the penalty phase the jury, having correctly been instructed under California law, sent the trial judge a note disclosing that the 11-juror, pro-death majority had concluded, erroneously, that the mitigating evidence the defense had presented could not even be considered, and that the one juror who had considered this evidence had determined that it warranted imposition of a sentence of life without parole. Although the jury's note requested further "direction," the trial court gave no supplemental instructions, but merely referred the jury to an unspecified instruction from the original charge and re-read another, non-responsive instruction.

The Court below, in an *en banc* decision, correctly concluded that because the trial court had failed to disabuse the jurors of their mistaken belief that they should disregard Respondent's mitigating evidence, and give it no weight, there was a "reasonable likelihood" that McDowell was deprived of his constitutional right to have all of his sentencing jurors consider all of the evidence he presented. Boyde v. California, supra, 494 U.S. 370; Eddings v. Oklahoma, supra, 455 U.S. 104.

This case does not warrant review by this Court. The validity of California's capital sentencing scheme is not at issue, see Boyde v. California, supra, 494 U.S. 370; nor is the sufficiency or accuracy of any of the instructions that were given in this case, compare, Buchanan v. Angelone, supra 118 S.Ct. 757. The Court below merely applied this Court's well-established capital sentencing jurisprudence, dating from Eddings v. Oklahoma and most recently reaffirmed in Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, 761 (1998), to the facts of this case, which feature the jury's telling note. Thus, contrary to Petitioner's

assertion, the decision below announces no "new rule" of any sort, within the meaning of Teague v. Lane, 489 U.S. 288 (1989).

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. THE *EN BANC* DECISION BELOW DOES NOT CONFLICT WITH ANY FEDERAL PRECEDENT OF THIS COURT OR OF ANY CIRCUIT COURT

#### A. The Ninth Circuit Correctly Concluded That Supplemental Instructions Were Required In This Case To Disabuse The Jurors Of Their Mistaken Belief That They Could Not Consider Respondent's Mitigating Evidence.

As the Ninth Circuit noted in its decision below, the parties agree that the instructions initially given in this case were legally unobjectionable. These included an instruction listing the sentencing factors the jury was to consider under California Penal Code section 190.3 and an instruction regarding the "weighing" of aggravating and mitigating circumstances. It is also undisputed that so-called "catch-all" factor (k) correctly instructed the jury to consider "any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death," including the mitigating evidence Respondent presented. Indeed, the constitutional adequacy of this sentencing scheme was decided by this Court in Boyde v. California, supra, 494 U.S. 370, and is not at issue in this case.

However, even though the jury had correctly been instructed as to its sentencing obligation, and had been given the instructions in writing, after deliberating for over two days the jury candidly expressed their confusion and sought additional guidance:

We, the jury in the above entitled action, request the following:

Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which [of the] following circumstances can be considered mitigating circumstances.

1. Inadequate or insufficient psychiatric help.

2. Love/hate relationship with father/mother.

3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.

4. Religious extremes confused defendant.

5. Confusing sexual more's [sic] at home (incest), with mother condoning or aware of incest/abuse.

6. Accused of death of favorite sister.

7. Stress of divorce from family.

8. Rejection of mother's love during teen years.

Thank you.

McDowell, supra, 130 F.3d at 835; emphasis supplied by the Court.

As the Court below correctly noted, "the plain language of the jury's request for guidance demonstrates that 11 jurors were confused about the law and erroneously believed they could not consider eight aspects of McDowell's background as mitigating evidence." Id. at 837.

The Court below correctly concluded that because Respondent was entitled to the jury's consideration of that evidence, under Lockett, Eddings and their progeny,[4/] the jury's

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[4/] See, e.g., Mills v. Maryland, 486 U.S 367 (1988) (state unanimity requirement for mitigating circumstances held to violate the Eighth Amendment by improperly limiting the (continued...)

error was constitutionally significant. Under the particular circumstances of this case, in which as many as 11 jurors had stated their intention to disregard McDowell's indisputably mitigating evidence, see Skipper v. South Carolina, 476 U.S. 1 (1986),[5] the Court below concluded the trial court was required to do more than merely rely on the very instructions that had left the jury confused in the first instance — regardless of their facial accuracy. For some reason, those standard, unobjectionable instructions, which had already been given orally by the trial judge and which the jury had had two days to review in writing, were not sufficient for this jury. To avert obvious Eddings error, the Ninth Circuit held, the trial court was required, under Bollenbach v. United States, 326 U.S. 607, 612-13 (1946), to correct the jury's misunderstanding with "concrete accuracy." 130 F.3d at 839. Because the trial court failed to disabuse the jurors of their mistaken belief — stated in their note — that the evidence McDowell had presented could not be considered, the Court concluded that there was a "reasonable likelihood" that this jury applied the instructions given in a way that "prevent[ed] the consideration of constitutionally relevant evidence." Id at 841, citing Boyde v. California, supra, 494 U.S. at 380. The Court further reasoned that such error necessarily is "substantial and injurious," within the meaning of Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). 130 F.3d at 841.

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[4](...continued)
jury's consideration of mitigating circumstances); McKoy v. North Carolina, 494 U.S. 433 (1990) (same); Hitchcock v. Dugger, 481 U.S. 393 (1987) (improper disregard for nonstatutory mitigating circumstances); Skipper v. South Carolina, 476 U.S. 1 (1986) (improper exclusion of relevant mitigating evidence); and Penry v. Lynaugh, 492 U.S. 302 (1989) (defendant entitled to jury's consideration of evidence regarding mental retardation).

[5] Petitioner has not argued that the jury was confused as to whether the factors listed in the jury's note were mitigating as opposed to aggravating.

B. The Ninth Circuit's *En Banc* Decision Is Fully Consistent With *Buchanan v. Angelone*, and With *Eddings*, *Lockett* and *Boyde*.

Petitioner asserts that this Court's recent decision in Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757 (1998), in which the jury sought no additional guidance and sent out no note of any kind, "totally undercuts" the Ninth Circuit's *en banc* decision below. Id. at 9. According to Petitioner:

> The Ninth Circuit's decision was based on the concluded [sic] inadequacy of an instruction which covered an area as to which this Court later, in Buchanan, found there was no obligation to instruct at all.

Petition at 8. Although the constitutionality of California's sentencing scheme is not at issue in this case, Petitioner also argues, again erroneously, that the Ninth Circuit "misapplied Eddings . . . to invalidate" a jury instruction given in this case. Id.; emphasis supplied.

Contrary to Petitioner's assertion, the Ninth Circuit did not "invalidate" any California sentencing instruction; to the contrary, the Court and the parties all agreed that the instructions given in this case were legally adequate under Eddings, per Boyde. The court below merely held, consistent with Eddings, and Boyde, that the trial court in this case had erred by failing to correct the jury's mistaken belief, expressed in their note, that they could not consider Respondent's mitigating evidence.

The Ninth Circuit's decision is also consistent with Buchanan, which is readily distinguishable on its facts, and in any event squarely reaffirms the long-established holdings of Eddings and Boyde, on which the decision below expressly relied. In Buchanan the defendant in a multiple-murder capital case in Virginia challenged the sufficiency of the state's standard penalty phase jury instructions. Under that sentencing scheme the jury was

instructed that if they found beyond a reasonable doubt that the defendant's conduct was vile, "then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." Buchanan, 118 S.Ct. at 759-760.

At trial the defendant had presented substantial evidence regarding his troubled childhood. An expert psychiatrist had testified that the defendant was under extreme emotional distress at the time of the offense. In his closing argument the defendant's attorney had explained the concept of mitigation and had argued at length and in detail the mitigating import of the specific evidence presented. Id.; emphasis supplied.

Defense counsel then requested that the jury be given four special instructions, tailored to the mitigating evidence presented, in addition to the standard instructions. The trial court denied the request. Id. The jury deliberated and reached a verdict without requesting any further instruction or guidance. On the penalty phase verdict form the jury stated that they had unanimously found the Defendant's conduct was vile and, "having considered the evidence in mitigation of the offense," had unanimously fixed the punishment at death. Id.; emphasis supplied.

This Court rejected Buchanan's argument that he was constitutionally entitled to tailored instructions regarding the mitigating evidence he had presented, and to express instructions regarding the concept of mitigation. The Court concluded that Virginia's standard instructions satisfied the requirements of Lockett and Eddings, in that they did not constrain or preclude the jury's consideration of any mitigating evidence. Id. at 699. As in Boyde, the record in Buchanan disclosed no basis to doubt that the jury had understood its

sentencing task; i.e., there was no "reasonable likelihood that the [jury] . . . understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner." Buchanan, 118 S.Ct. at 763, quoting Boyde, 494 U.S. at 386. The court in Buchanan thus reaffirmed precisely the jurisprudence on which the Ninth Circuit relied in this case:

> In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. Penry v. Lynaugh, 492 U.S. 302, 317-318 (1989); Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978). However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. Johnson v. Texas, 509 U.S. 350, 362 (1993); Penry, supra, at 326; Franklin v. Lynaugh, 487 U.S. 164, 181 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Thus, in Boyde v. California, 494 U.S. 370 (1990), we held that the standard for determining whether jury instructions satisfy these principles was "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that prevents the consideration of constitutionally relevant evidence." Id., at 380; see also Johnson, supra, at 367-368.

Buchanan, 118 S.Ct. at 761.

In this case, as in Buchanan, the sentencing instructions originally given properly satisfy the requirements of Eddings and Lockett in that they permitted the jury to consider the mitigating evidence McDowell presented. See Boyde, supra 494 U.S. at 380. Indeed, Respondent has not argued that the jury was erroneously or inadequately instructed in the first instance. However, the record in this case, unlike that in Buchanan or in Boyde, does disclose a serious basis to doubt that the jury actually understood its sentencing task, notwithstanding the facial accuracy of the instructions. By its note the jury put on the record

that as many as 11 of its members had resolved to disregard some or all of McDowell's mitigating evidence.

Indeed, the jury's note distinguishes this case from the vast majority of capital cases, in which "[t]here is no extrinsic evidence of what the jury . . . actually thought" about mitigating circumstances. Mills v. Maryland, 486 U.S. 367, 381 (1988). In those cases it is presumed that they jury followed the instructions given. Francis v. Franklin, 471 U.S. 307, 324 n. 9 (1985). The reviewing court is left to examine what this Court more recently has referred to as the "context of the proceedings," to determine whether the jury in fact considered a defendant's proffered evidence in mitigation of his offense, or instead was confused or misled. Buchanan, 118 S.Ct. at 762, quoting Boyde at 383.

In this case the "context of the proceedings" conspicuously includes the jury's note, which the Ninth Circuit correctly took at face value: as a candid statement of the jurors' misunderstanding of the law and their sentencing task. Contrary to Petitioner's repeated attempts to recast the jury's note as a mere "inquiry" about the evidence, or about how much weight to give it (see, e.g., Petition at 3, 5, 11, 12 n. 5), the note is a statement of the 11-jurors' mistaken belief that the evidence Respondent had presented did not constitute "either testimony or evidence that should be considered" — at all. Under these circumstances, it can no longer be presumed that the jury correctly followed the instructions originally given. The Ninth Circuit thus concluded, consistent with Boyde and Buchanan, that the because the trial court failed to correct the jury's misunderstanding there was a "reasonable likelihood" that the jury did misapply the instructions so and did refuse to consider the mitigating evidence that Respondent had presented in support of a sentence less than death.

The fact that the instructions that were originally given were facially unobjectionable is thus legally irrelevant, as the Ninth Circuit correctly points out. McDowell, supra, 130 F.3d at 838-339. In fact, McDowell has not alleged that the instructions that were given in this case affirmatively misled or constrained the jury in its consideration of the mitigation evidence he presented. In the Ninth Circuit McDowell did not challenge the constitutionality of California's statutory scheme. In Buchanan, by contrast, the defendant had argued that Virginia's standard instructions did not provide the jury with adequate guidance about the concept of mitigation and did not inform the jury that the evidence he had presented constituted mitigating circumstances. Buchanan, 118 S.Ct. at 760-761.

McDowell, on the other hand, has attributed the jury's confusion not to the instructions given but to other sources. He has argued that the prosecutor improperly confused the jury and falsely skewed their sentencing determination by arguing that the absence of potentially mitigating circumstances should be counted as an aggravating circumstances. Notably, the prosecutor explicitly told the jury that the absence of any expert psychiatric evidence of "extreme mental or emotional disturbance" "is an aggravating circumstance."[6/] Respondent's own attorney failed to argue the mitigating import of the lay testimony that the defense did present and made no reference to the sentencing factors relevant in mitigation.

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[6/] The three-judge panel correctly concluded that while the prosecutor properly could argue that there was no evidence of mental impairment, "[t]he prosecutor could not argue, however, that under California law this lack of evidence constituted a positive aggravating factor. See People v. Davenport, 710 P.2d 861 (Cal. 1985)." The Court found that any Davenport error was harmless. McDowell v. Calderon, 107 F.3d at 1364-65.

Ultimately, however, the extrinsic source of the jury's confusion is irrelevant. Whatever the reason for the jury's confusion, the original charge became inadequate, in this case, once the jury informed the trial court that it was mistaken about the law. By failing to correct the jury's misunderstanding the trial court left the jurors free to do precisely what their note said they would do — give Respondent's mitigating evidence no weight, in violation of Eddings, supra, 455 U.S. at 114-115 (although the jury determines the weight to be given to mitigating evidence, the jury "may not give it no weight by excluding such evidence from their consideration.") Given the jury's note, the Ninth Circuit correctly concluded that there was a "reasonably likelihood" that the jurors had applied the instructions originally given in a way that violated Respondent's federal constitutional right under Eddings.

C. The Ninth Circuit's *En Banc* Decision Is Consistent with *Bollenbach v. United States* and Its Progeny In the Circuit Courts and Imposes No "Unprecedented and Improvident Obligation" On Trial Courts.

As the Ninth Circuit correctly observed, it is settled and "unremarkable" that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." McDowell, supra, 130 F.3d at 839; quoting Bollenbach v. United States, supra, 326 U.S. at 612-613. As the "governor of the trial," Bollenbach, 326 U.S. at 612, the trial judge has "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem." Davis v. Greer, 675 F.2d 141, 145 (7th Cir.) cert. denied, 459 U.S. 975 (1982); quoted in McDowell, 130 F.3d at 839.

The Court below correctly concluded that the jury in this case, having been properly instructed, nonetheless expressed its confusion about mitigating circumstances -- a key legal principle in a capital case. Therefore, reiteration of "the same instructions that for some unknown reason eleven of the jurors did not correctly understand in the first place" was not sufficient, under Bollenbach. McDowell, 130 F.3d at 838. The Court likened this case to United States v. Warren, 984 F.2d 385, 339 (9th Cir. 1993), in which the jury had asked: "Is premeditated to 'hurt' the same as premeditated to 'kill'?" McDowell, 130 F.3d at 839, citing Warren, 984 F.2d at 329:

> In responding to the jury's inquiry in [the circumstances of that case]" it [was] not sufficient for the court to rely on more general statements in its prior charge." United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989). Referring the jury back to the original instruction would not correct the apparent impression of at least some jurors that intent "to hurt" rather than "to kill" might be sufficient to convict Warren of first degree murder. The Court should have provided a supplemental instruction sufficient to clear up the uncertainty that the jury had brought to the Court's attention.

Id., quoting Warren, at 330.

The Court below also cited the following additional cases, from this and other circuits, in which the courts have held that reliance on the original charge was not sufficient when the jury had expressed its confusion on a legal issue: United States v. Gordon, 844 F.2d 1397, 1401-02 (9th Cir. 1988) (error to rely on original instruction where jury expressed confusion regarding conspiracy counts); United States v. Walker, 575 F.2d 209, 213 (9th Cir.), cert. denied, 439 U.S. 931 (1978) (trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion); United States v. Bolden, 514 F.2d 1301 (D.C. Cir. 1975) (trial court rereading statute and standard instruction was insufficient where jury showed confusion regarding

felony murder); United States v. Petersen, 513 F.2d 1133, 1136 (9th Cir. 1975) ("quite cursory" supplemental instruction misleading and mandates reversal where jury inquiry reveals confusion regarding issue of intent); Powell v. United States, 347 F.2d 156, 157-58 (9th Cir. 1965) (where a jury, having correctly been instructed in the law, then expresses its confusion on a legal principle, "[i]t is no answer to say that the supplemental instruction was correct, so far as it went; or that it was to be read in the light of the original instructions and that these fairly presented the issues.") McDowell, 130 F.3d at 839, n. 3.

Others could be added to this list. See, e.g., United States v. Stevens, 38 F.3d 167 (5th Cir. 1994) (court's response to jury inquiry expressing confusion as to role of photograph of gun was inadequate, where court merely instructed the jury to "consider all the evidence in the record" and stated that the court was "not allowed to answer" the jury's question); United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991) (error to fail to give supplemental instruction where question from jury addresses central legal issue; "the jury should have been instructed in a way that there was no possibility that the conviction was based on an incorrect legal basis" (emphasis supplied); Newlon v. Armontrout, 885 F.2d 1328, 1334-1335 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990) (the trial court had erred in refusing to clarify the term "depravity of mind," which had not been defined for the jury). Thus, the Court below correctly concluded that reliance on the original charge was not sufficient to correct the jurors' expressed misunderstanding of the concept of mitigating circumstances.

Ignoring the plain words of the Ninth Circuit's decision, and the wealth of relevant case law, Petitioner now asserts that the Court "has, in effect, imposed (indeed, it has

created) a new obligation on state and federal trial courts alike to respond to jury inquiries only with new language." Petition at 6; emphasis supplied. With similar hyperbole, Petitioner maintains that the Court has ruled categorically that the Eighth Amendment "precludes a trial court from responding to a jury inquiry on consideration of potentially mitigating evidence by referring the jury to responsive and legally flawless, but previously given, instructions." Petition at 8 (heading); emphasis supplied.

This is plainly not what the Court below has done. To the contrary, the Court expressly acknowledged that "the manner in which th[e] clarifying task must be done is within the sound discretion of the trial court." McDowell, supra, 130 F.3d at 839; emphasis supplied. The Court also noted that "the federal Courts of Appeal have approved in some federal cases (which the State brings to our attention), the practice of simply rereading or referring the jurors to the instructions already read." Id.; emphasis supplied. The Court correctly distinguished those cases and concluded that in this case reliance on the original charge was not sufficient to clarify and correct an error, under Eddings, of federal constitutional dimension. Id., citing Bollenbach, supra, 326 U.S. at 612-613.[7/]

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[7/] The court below correctly distinguished United States v. Collom, 614 F.2d 624 (9th Cir. 1979), cert. denied, 446 U.S. 923 (1980), on the grounds, inter alia, that the jury's note in that case was merely "unclear," that the inquiry did not relate to a matter of constitutional importance, and that the trial court had invited the jury to return for further instructions "should the confusion persist." McDowell, 130 F.3d at 839, quoting Collom, 614 F.2d at 631.

Other cases, cited by Petitioner, are likewise distinguishable:

In United States v. Papia, 560 F.2d 827, 843 (9th Cir. 1977), the jury had asked whether one could be found guilty of conspiracy if the acts committed furthered the conspiracy, but were committed for different reasons. The trial court engaged in a colloquy with counsel as to the possible misleading effect of a simple "no" answer. One of the two co-defendants agreed to the re-reading of all of the conspiracy instructions; the other wanted

(continued...)

The Court thus did not create a "new obligation" compelling all trial courts in the future to always respond to jury inquiries by crafting supplemental instructions. The Court merely applied Bollenbach to the facts of this case.

Petitioner also argues, erroneously, that the decision below forces trial courts to follow "the inherently hazardous course" of fashioning "extemporaneous and ad hoc instructional creation[s]" whenever the jury speaks. In thus decrying the pitfalls of supplemental instructions Petitioner not only misconstrues the holding below, which does not compel supplemental responses in all cases, but also flatly misquotes the Court's decision. According to Petitioner:

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[7/](...continued)
the trial court to merely say "no." When asked whether a re-reading of the conspiracy instructions would suffice, the jury foreman confirmed that, "[t]hat is what we want." The jury had apparently not been given the instructions in writing.

In United States v. Braverman, 522 F.2d 218 (7th Cir. 1974), cert. denied, 423 U.S. 985 (1975), also cited by Petitioner, the trial court played a tape of the entire charge, in response to the jury's inquiry regarding an accessory count. The jury apparently did not have the instructions in writing. Moreover, the defendant was then acquitted of the accessory count.

In United States v. White, 794 F.2d 365 (8th Cir. 1986), the jury had asked for a definition of conspiracy, which the original charge specifically contained. Here the original instructions, while legally correct, contain no definition of mitigation or mitigating circumstances. Moreover, in White one of the two defendants had agreed to the trial court's rereading of the definition of conspiracy. Id. at 370.

In United States v. Hayes, 794 F.2d 1348 (9th Cir. 1986), cert. denied, 479 U.S. 1086 (1987), the trial court did give substantive supplemental instructions, rather than merely rely on the original charge.

In United States v. Andrew, 666 F.2d 915 (5th Cir. 1982), the jury had asked about the burden of proof on an insanity defense. The trial court referred the jury to a specific instruction from the original charge, identified by its number, which defined insanity and clearly stated that the burden was on the Government to prove sanity. There was also no indication that the jury had been provided with the instructions in writing.

> The inherently hazardous nature of the new-language-only straightjacket in which the Ninth Circuit has encased trial judges is demonstrated by the majority's own creation — that the jury should have been told that it was free to consider any aspect of McDowell's background and character he offered as mitigating and that "some, if not all, of the listed factors, could fall within the category."

Petition at 15 (emphasis supplied), citing McDowell, 130 F.3d at 841. Petitioner then goes on to criticize this proposed response, as a "facially flawed product" that might cause the jury to wonder which of the factors listed in the jury's note could be considered, rather than to consider them all. Id.

In fact, the quoted language is not the Ninth Circuit's "creation" at all, but the California Supreme Court's. Id., quoting People v. McDowell, 46 Cal.3d 551, 578 (1988). The Ninth Circuit merely quoted this language in response to the dissenting judges' concern that the task of responding to a jury's note with supplemental instructions would force trial judges to "embark upon unfamiliar seas fraught with peril." McDowell, 130 F.3d at 843 (Thompson, J. dissenting). The point, in other words, is that even the California Supreme Court conceded that the trial court safely could have given a supplemental response; not that the response it hypothesized in *dictum* was the response that should have been given in this case. Indeed, Ninth Circuit makes clear its own view that "the factors . . . listed in the note" — all of them, and not just "some" of them — "undeniably qualify under Lockett and Eddings as mitigating evidence. See Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986)." Id. at 837. Far from adopting the state court's equivocal *dictum*, the court below stressed that the trial court in this case not only "could" have given supplemental instructions, "but after Eddings . . . was required to take appropriate steps to preserve McDowell's right to a

proper decision by the jury grounded in the Constitution." McDowell, supra, 130 F.3d at 841; emphasis supplied.

As the Court below observed, state and federal judges routinely settle jury instructions and answer juries' questions. Id. at 841. See, e.g., United States v. Slaughter, 128 F.3d 623, 627 (8th Cir. 1997) (supplemental instructions regarding conspiracy); United States v. Felici, 54 F.3d 504 (8th Cir.), cert. denied, 116 S.Ct. 251 (1995) (response to question regarding felon's right to possess weapon); United States v. Lakich, 23 F.3d 1203 (7th Cir. 1994) (supplemental instruction defining "extraordinary inducement" and clarifying jury's obligation to separate consideration to each count); United States v. Ellis, 23 F.3d 1268 (7th Cir. 1994) (supplemental instructions regarding entrapment). As this Court made clear in Bollenbach, that is one of the trial judge's duties as the governor of the trial. 326 U.S. at 612. By abdicating that duty in this case, the trial court allowed the jury to disregard Respondent's mitigating evidence, in violation of Eddings.

## II. THE *EN BANC* DECISION BELOW ANNOUNCES NO "NEW RULE" WITHIN THE MEANING OF *TEAGUE V. LANE*

In an attempt to bring this case within the purview of Teague v. Lane, supra, 489 U.S. 288, Petitioner asserts that the *en banc* decision below announces a "new constitutional rule:" that trial courts are categorically "prohibited" from ever responding to jury inquiries by reiterating previously given, legally correct instructions. Petition at 17. The argument ignores the true basis of the Court's holding in this case. As the Court explained, reversal of Respondent's death sentence is dictated by Eddings and Lockett, which long pre-date the finality of McDowell's case in state court and which guarantee him the right to have his

capital sentencing jury consider the mitigating evidence he presented. When the jury in this case informed the trial judge that it believed, erroneously, that it could not consider that evidence, it alerted the court to impending constitutional error. The trial court then allowed that error to go uncorrected, contrary to its obligation under Bollenbach to clarify juror confusion with "concrete accuracy."

Petitioner attempts to distinguish Eddings. Apparently, Petitioner takes the position that in Eddings the trial judge read the law once and misunderstood it, whereas in this case the trial judge asked the jury to take another look:

> True, the instant case can be compared to Eddings in that in each there was an expression related to the sentencer's point of view on consideration of evidence. However, unlike the instant case, the sentencer in Eddings was not subsequently exposed to a proper statement of the law. [¶] In other words, the Ninth Circuit's eosinophilic (sic) analysis suffers from the 'apples and oranges' syndrome. Eddings is directed to the scope of evidence; the instant case concerns the method by which the law is communicated to a jury.

Petition at 19. Whatever this means, the attempt to distinguish Eddings must fail. The trial judge in Eddings, like the jury in this case, mistakenly thought that legally he could not consider the mitigating evidence the capital defendant had presented. He put this on the record, as the jury did here in their note. The fact that in Eddings the law did not preclude the judge's consideration of the evidence at issue, just as here the instructions did not preclude the jury from considering McDowell's mitigating evidence, is irrelevant. What matters is that the sentencer in each case mistakenly believed that the mitigating evidence could not be considered. Under these circumstances, this Court has declined to assume that the sentencer actually did consider the evidence. As Justice O'Connor stated in Eddings:

> Even though the Petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is 'purely a matter of semantics,' as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings v. Oklahoma, supra, 455 U.S. at 119 (O'Connor, J., concurring); emphasis supplied.

Moreover, in Mills v. Maryland, supra, 486 U.S. 367, this Court made clear that the source of the impediment to the sentencer's consideration of mitigating evidence is irrelevant:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; Hitchcock v. Dugger, 481 U.S. 393 [95 L.Ed.2d 347, 107 S.Ct. 1821] (1987); by the sentencing court, Eddings v. Oklahoma, supra; or by an evidentiary ruling, Skipper v. South Carolina, supra. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing." Eddings v. Oklahoma, 455 U.S. at 117 n., 71 L.Ed.2d 1, 102 S.Ct. 869 (O'Connor, J., concurring).

Mills, 486 U.S. at 375; emphasis supplied.

As explained above, the Court below did not hold that a trial court in a capital case may never respond to any jury inquiry by reiterating previously given legally correct instructions. All that the Ninth Circuit held is that in this case the instructions previously given, while legally unobjectionable, were not clearly and concretely responsive to this jury's particular inquiry, which by its terms revealed that 11 jurors had erroneously concluded that

they could not consider the mitigating evidence McDowell had presented. This expression of juror confusion — announcing a violation of McDowell's established right, under Eddings and Lockett, to have all of the jurors consider all of his mitigating evidence — called for supplemental, concrete clarification. McDowell's constitutional right to have his sentencer consider his mitigating evidence was established in Eddings and Lockett, before McDowell was even tried. The requirement that trial court's clarify juror confusion with "concrete accuracy" dates to this Court's 1946 decision in Bollenbach v. United States.

Nor is this "the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct." Petition at 17, quoting McDowell 130 F.3d at 843 (Kozinski, J., dissenting). Consistent with Bollenbach, the Court below correctly analogized this case to Warren, Gordon, Bolden and Powell, all of which hold that reliance on correct original instructions was not sufficient. Similarly here, the Court below properly focused not so much on the accuracy of the original charge, which was not disputed, but on whether the court had actually clarified the jurors' expressed confusion and corrected their mistake about the law.

Finally, the decision below does not announce a rule requiring trial courts in capital cases to give supplemental instructions that are not constitutionally required to be given in the first instance, per Buchanan. As explained above, McDowell did not argue below that he was constitutionally entitled at the outset to a set of instructions tailored to his particular mitigating evidence, or that the jury was erroneously or inadequately instructed in the first instance. He merely argued that once the jury had informed the court that 11 jurors intended

to disregard his mitigating evidence — which did not occur in Buchanan — corrective measures were required, under Eddings and Lockett.

Because the Court below did not announce a "new rule" in this case Petitioner's contention that the Ninth Circuit has in other cases "regularly failed to apply and implement Teague" is irrelevant. Petition at 22 (heading). In any event, all that is established by Petitioner's string of citations is that the State routinely raises a Teague claim in virtually every habeas corpus case regardless of the merits of the claim.[8/] This case is merely the latest to do so.

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[8/] Most of Petitioner's citations are incomplete, typically omitting to note denial of certiorari by this Court. See e.g., Rupe v. Wood, 93 F.3d 1343 (9th Cir. 1996), cert. denied, 117 S.Ct. 1017 (1997); Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994), cert. denied, 513 U.S. 1117 (1995); Fetterly v. Paskett, 15 F.3d 1472 (9th Cir.), cert. denied, 513 U.S. 914 (1994); McKensie v. Day, 57 F.3d 1461 (9th Cir.), cert. denied, 514 U.S. 1104 (1995); Jiminez v. Myers, 12 F.3d 1474 (9th Cir. 1993), cert. denied, 513 U.S. 810 (1994); Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060 (1994); Blazak v. Ricketts, 1 F.3d 891 (9th Cir. 1993), cert. denied, 511 U.S. 1097 (1994); Robinson v. Borg, 918 F.2d 1387 (9th Cir. 1990), cert. denied, 502 U.S. 868 (1991).

Moreover, *en banc* review, which the Ninth Circuit granted in this case, was granted in only one of the cases Petitioner cites, Jeffers v. Lewis, 974 F.2d 1075 (9th Cir. 1992), resulting in a new decision, Jeffers v. Lewis, 38 F.3d 411 (9th Cir. 1994), cert. denied, 514 U.S. 171 (1995).

## CONCLUSION

For the foregoing reasons, Respondent Charles E. McDowell, Jr., respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: March 25, 1998

**ROSEN, BIEN & ASARO, LLP**

By _____
Andrea G. Asaro
Attorneys for Respondent
Charles E. McDowell, Jr.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 97-1414

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ARTHUR CALDERON, Warden

Petitioner,

v.

CHARLES E. MCDOWELL, JR.,

Respondent.

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## CERTIFICATE OF SERVICE

I, Andrea G. Asaro, a member of the Bar of this Court, hereby certify that on this 25 th day of March, 1998, I caused one copy of Respondent's Brief in Opposition and Motion to Proceed in Forma Pauperis in the above-entitled case to be mailed, first class postage prepaid, to all parties required to be served in this matter, as indicated on the attached list. I declare under penalty of perjury that the foregoing is true and correct. Executed this 25 th day of March, 1998, at San Francisco, California.

By: Andrea Asaro
ANDREA G. ASARO

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner.*

v.

CHARLES E. McDOWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITIONER'S OPPOSITION TO RESPONDENT'S REQUEST FOR JUDICIAL NOTICE

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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1997

No. 97-1414

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ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES E. McDOWELL, *Respondent.*

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## INTRODUCTION

Following the filing of a Petition for Writ of Certiorari herein by Petitioner, and the filing of a Respondent's Brief in Opposition, Respondent Charles McDowell, Jr. has submitted a Respondent's Request for Judicial Notice of Petitioner's Judicial Admission (hereinafter "Req. Jud. Not.").

Invoking Rule 201 of the Federal Rules of Evidence and the Court's inherent power to govern its own proceedings, McDowell requests the Court to take judicial notice of two documents in *Morris v. Calderon*, CIV S-92-0483 EJG GGH P, an Eastern District of California habeas corpus matter: (1) the Magistrate Judge's Findings and Recommendations, and (2) the respondent warden's objections thereto. (Req. Jud. Not. at 1-2.)

The requested judicial notice is sought for the purpose of supporting McDowell's unsustainable contention that the State of California, in that district court case, has conceded that the Ninth Circuit's en banc

decision in the instant case, *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997), was correctly decided. (Req. Jud. Not. at 2-3, 4.)

Petitioner herein replies below that it has consistently been the State's position that the en banc decision in *McDowell v. Calderon* is wrong and contrary to law, that the State has not conceded any correctness to that decision in the district court document cited by McDowell, and that McDowell's Request for Judicial Notice is not well taken. (*See* Fed. R. Evid. 201(d) ("[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice").[1/]

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1. McDowell's instant effort is arguably more akin to a supplemental brief than a request for judicial notice of adjudicative facts pursuant to Federal Rule of Evidence 201. Counsel for Petitioner has been informed by the Office of the Clerk that, indeed, McDowell's Request for Judicial Notice is being treated as a supplemental brief. *See* Sup. Ct. R. 15(8).

## ARGUMENT

### PRESENTING A SUMMARY OF AN ERRONEOUS CIRCUIT COURT OF APPEALS DECISION IN A DISTRICT COURT DOCUMENT IS NOT A CONCESSION THAT THE APPELLATE CASE WAS CORRECTLY DECIDED

The core of the Ninth Circuit's en banc decision herein is that a "technically flawless" instruction governing mitigating evidence in the penalty phase of a capital case, *McDowell v. Calderon*, 130 F.3d at 838, "*became* inadequate" (Resp. Br. in Opp. at 16 (emphasis in original)) when the jury inquired of the court whether it could consider eight listed instances of McDowell's background as mitigation.

The State petitioned for certiorari not simply because the Ninth Circuit was wrong, but because, in addition, the matter at issue is important and the en banc majority's decision conflicts with those of other circuits and the state supreme court, reflects consistent Ninth Circuit violation of the "new rule" proscription of *Teague v. Lane*, 489 U.S. 288 (1989), and merits an exercise of the supervisory powers of this Court. *See* Sup. Ct. R. 10.

After the filing of the Petition for Writ of Certiorari herein, a Magistrate Judge in the Eastern District of California, on March 3, 1998, issued unpublished Findings and Recommendations in the capital habeas corpus case of *Morris v. Calderon*, CIV S-92-0483 EJG GGH P, which relied extensively upon the Ninth Circuit en banc decision at issue herein in the course of finding error in the state trial court's responding to the jury's penalty phase inquiry

by referring it to an erroneous written instruction on the possibility of parole. *Morris*, slip op. at 2-4, 6-11.[2/]

The respondent warden, on April 2, 1998, filed objections to the magistrate judge's Findings and Recommendations, contesting the conclusion that the alleged error had a substantial and injurious effect or influence on the jury's penalty determination. *Morris*, Respondent's Objections to the Findings and Recommendations of the Magistrate Judge Filed March 3, 1998 (hereinafter "Morris Objections").[3/] At the end of the respondent warden's argument is the following footnote:

> The Magistrate Judge mistakenly found that these claims were controlled by the Ninth Circuit's recent en banc opinion in *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997). Contrary to the Magistrate's findings, *McDowell* does not control in this case. In *McDowell*, the trial court's error was the failure to answer the jury's question as to whether it could consider certain factors as mitigating evidence. The court simply referred the jury to the court's previous instructions. The jury did not understand what evidence it could consider mitigating and the court's responses did nothing to clarify the problem. Since the court failed to answer the jury's question, the error went directly to the jury's consideration of the mitigating evidence in

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2. A copy of the Findings and Recommendation in *Morris* is attached to the Request for Judicial Notice as Exhibit A.

3. A copy of the objectives filed in *Morris* is attached to the Request for Judicial Notice as Exhibit B.

> *McDowell's* case. Since such consideration is an essential component of the Eighth Amendment's requirements for a rational and reliable death verdict, the error was prejudicial. Thus, the error in *McDowell* went directly to the jury's consideration of the mitigating evidence and the reliability of the verdict. *McDowell v. Calderon*, 130 F.3d at 838. The prejudice was inherent.
>
> In this case, the erroneously typed instruction did not affect the reliability of the death verdict. *McDowell* does not foreclose a prejudice analysis if it can be made. Unlike *McDowell*, there is no question that the jury in Petitioner's case understood its responsibility to consider the mitigating evidence. Furthermore, unlike *McDowell*, it can be determined that the erroneous instruction did not affect the outcome. There is no reasonable likelihood the jury applied the erroneous instruction in a manner that prevented consideration of relevant evidence of rendered the death verdict unreliable.

Morris Objections at 14 n.6.

The language and context of the quoted passage are inconsistent with McDowell's brash notion that some kind of concession has been made of the correctness of the Ninth Circuit's maverick determination in the instant case. The language upon which McDowell relies summarizes and seeks to distinguish; it does not approve or validate; at most, it implies recognition of existing precedent in the circuit and acquiesces therein for purposes of the limited confines of the specific effort to object to the magistrate's recommendations. After all, even though the Ninth Circuit's *McDowell* opinion undoubtedly was perceived as contrary to logic and precedent, and still subject to this

Court's discretionary rectification, because *McDowell* was distinguishable from *Morris*, and because the chances of a district judge's rendering a decision inconsistent with published in-circuit en banc precedent would be very small, it is more than understandable that a party would deal with the *McDowell* opinion by differentiating it rather than challenging it.

## CONCLUSION

Contrary to McDowell's claim, the State has conceded nothing, the Ninth Circuit majority opinion remains a judicial anathema, and, if anything, the material presented to this Court in McDowell's Request for Judicial Notice corroborates the potential that opinion has for widespread negative impact and, accordingly, the appropriateness of granting certiorari herein.

Dated: April 14, 1998.

Respectfully submitted,

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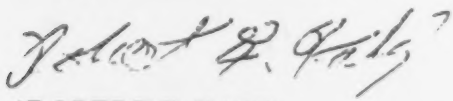

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**ORIGINAL**

Supreme Court, U.S.
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APR 8 1998
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APR 9 1998

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

(5)

No. 1414

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ARTHUR CALDERON, Warden,

Petitioner,

v.

CHARLES E. McDOWELL, JR.,

Respondent.

---

Respondent's Supplement

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**RESPONDENT'S REQUEST FOR JUDICIAL NOTICE OF PETITIONER'S JUDICIAL ADMISSION**

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 1414

---

ARTHUR CALDERON, Warden,

Petitioner,

v.

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Respondent.

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**RESPONDENT'S REQUEST FOR JUDICIAL NOTICE OF PETITIONER'S JUDICIAL ADMISSION**

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## INTRODUCTION

This is a capital case, pending before this Court on Petitioner Arthur Calderon's Petition for Writ of Certiorari, which was filed on or about February 27, 1998. Respondent Charles E. McDowell, Jr., filed his Brief in Opposition on or about March 25, 1998. Petitioner is seeking review by this Court of the *en banc* decision of the Ninth Circuit Court of Appeals vacating McDowell's death sentence.

McDowell, by his undersigned counsel, hereby requests, pursuant to Rule 201 of the Federal Rules of Evidence and the Court's inherent power to govern its own proceedings,

that this Court take judicial notice of the file endorsed copies of the following two documents filed in the United States District Court for the Eastern District of California in the habeas corpus action entitled Morris v. Calderon, No. CIV S-92-0483 EJG GGH P: (1) the "Findings and Recommendations" filed by the Magistrate Judge on or about March 3, 1998, regarding certain of petitioner Bruce Morris' claims for relief (attached as Exhibit A hereto); and (2) the State's "Objections" thereto, filed on or about April 2, 1998 (attached as Exhibit B hereto).

In Morris v. Calderon, also a capital case, the petitioner has asserted, inter alia, a claim challenging the sufficiency of the trial court's response to an inquiry by the capital sentencing jury regarding an instruction that erroneously included a reference to "life with the possibility of parole." The Magistrate Judge recommended granting relief on the claim, citing the Ninth Circuit's *en banc* decision in this instant case, McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997).

In his objection to this recommendation the State has conceded that the Ninth Circuit's *en banc* decision in the instant case was correctly decided:

> Contrary to the Magistrate's findings, *McDowell* does not control this case. In *McDowell*, the trial court's error was the failure to answer the jury's question as to whether it could consider certain factors as mitigating evidence. The court simply referred the jury to the court's previous instructions. The jury did not understand what evidence it could consider mitigating and the court's response did nothing to clarify the problem. Since the court failed to answer the jury's question, the error went directly to the jury's consideration of the mitigating evidence in McDowell's case. Since such consideration is an essential component of the Eighth Amendment's requirements for a rational and reliable death verdict, the error was prejudicial. Thus, the error in *McDowell* went directly to the jury's consideration of the mitigating evidence and the reliability of the verdict. *McDowell v. Calderon*, 130 F.3d at 838. The prejudice was inherent.

Exhibit A

FILED

MAR - 8 1998

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE MORRIS,

Petitioner,

vs.

ARTHUR CALDERON,

Defendants.

No. CIV S-92-0483 EJG GGH P

**DEATH PENALTY CASE**

FINDINGS AND RECOMMENDATIONS

CLAIM 36 (IN PART); CLAIM 40

_____/

**INTRODUCTION AND SUMMARY**

In part of Claim 36 and in Claim 40[1], petitioner alleges that the transmission to the jury of a written instruction, which the parties agree was erroneous, during the penalty phase violated the Eighth and Fourteenth Amendments. Petitioner further argues that the trial judge compounded the error, when in response to a jury inquiry, he told the jury to reference the erroneous instruction. The court has broken out this claim from the remainder in the First

[1] Claim 40 (transmission of erroneous written instruction to the jury and subsequent erroneous clarification) completely duplicates part of the claim contained in Claim 36. Claim 36 contains an additional allegation collaterally pertinent here about the judge's inquiry into the numerical division of the jury. The court is puzzled about petitioner's organization of the erroneous written instruction claim, but in any event will not adjudicate here the numerical division claim.

Amended Petition (hereafter Petition) because the claim is perhaps the most problematic in the Petition, and the efficiency of the adjudication would be enhanced if the parties are working on objections, if any, while the court finalizes its Findings and Recommendations on the remaining claims. In addition, this penalty phase claim encompasses its own discrete facts and is not dependent on the other facts of the case.

The inescapable conclusion, in light of the binding, on-point authority of McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997 ) (en banc), is that this penalty phase claim should be found in petitioner's favor, and that the writ of habeas corpus be granted with respect to the penalty phase.

**FACTS**

Petitioner, Bruce Wayne Morris, was convicted of a grisly murder/robbery for which the prosecution sought the death penalty. Petitioner was convicted in the guilt phase of felony murder and the special circumstance of robbery in connection with the murder was found true. Claim 36 and 40 allege violations of the Eighth and Fourteenth Amendments during the time at which the jury was involved in penalty phase deliberation. The precise claim revolves about Special Jury Instruction No. 60.

The court and counsel addressed Instruction 60 during discussions regarding proposed penalty instructions:

> Court: With reference to special instruction no. 60, reasonable doubt, I have some questions about that. I want to give special instruction number 60, but I have a question mark.
>
> Mr. Condit [petitioner's counsel]: Yes, Your Honor. We would ask that it be given. I don't have a copy of that particular instruction.
>
> Mr. Rossi [prosecutor]: Neither do I.
>
> Court: "If you have a reasonable doubt as to which penalty to impose, death or life imprisonment–life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison ***with*** the possibility of parole," citing People v. Cancino.
>
> Mr. Condit [petitioner's counsel]: We would–we think that's appropriate, Your

> Honor. I know the law in this area is a little unsettled, but we would submit that that's appropriate.
>
> Court: I have no–I have a yes. I want to give it but with question mark, and I will give it with a question mark. Defendant's Special Instruction Number 75, goes hand in hand with this Number 60, and the Court will be giving Number 75.

RT 5267-5268 (emphasis added).

During this conference, neither the trial court nor counsel realized the apparent typographical error in special instruction 60 even though the court read it out loud. Clearly, the error thus far was inadvertent.

It appears that when the trial judge read Instruction 60 to the jury, he realized the error. He corrected himself and read the instruction as it should have been read:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison ***with*** the possibility of–***without*** the possibility of parole.

RT at 5339. (emphasis added)

Unfortunately, the trial judge did not correct the written instruction before submitting it to the jury for their use during deliberations. CT 2504. Thus, any reference to the instruction by the jury would have given erroneous information about the possibility of parole.

It so happened that the jury had questions during the course of the penalty phase deliberations. The jury had a question about the eventuality of not being able to reach a decision, and a question about Instruction 60. The exact questions are contained within the Clerk's Transcript at 2530: "In the event this jury cannot decide 100% on the penalty phase of the case what would be the sentence imposed? Please explain noted page of instructions [Instruction 60]."[2]

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[2] Also, after the jury retired subsequent to the judge's response to their question, the jury questions were summarized for petitioner on the record. RT 5348. Instruction 60 was clearly referenced.

> Court: Mr. Lewis, the Court has been in receipt of your question, or questions. And before I respond to the questions, I have discussed them with counsel as well. Without telling me exactly how the jury stands one way or the other, can you give me some idea or give us an idea about the numerical count, how might it stand? Seven/five, six/six, four/eight?
>
> Juror Lewis: Approximately ten to two, Your Honor.
>
> Court: Do you feel as though if I allow you to continue to deliberate, you might be able to reach a decision in the matter?
>
> Juror Lewis: I think there's a possibility, your Honor.
>
> Court: I'm going to let you do that. The statutes provide for what happens in the event that you folks aren't able to reach a decision, but I can't tell you what that is at this point in time. So that's the answer to your first question. I am unable to tell you. ***The answer to your second question is that I feel as though the instruction itself is self-explanatory. And we would hope with that in mind, that you might be able to reach a decision.*** I suggest that you take as long as you might want to take. Don't rush. Please do not rush, all right?

RT at 5347-5348 (emphasis added).[3]

**ANALYSIS**

The claim involving the erroneous written jury instruction 60 was raised on direct appeal, and the California Supreme Court responded to the claim.

> In merely asking for an 'explanation,' the jury did not specify its concerns, if any, about the instruction. The reason for its inquiry may or may not have been the typographical error. No juror expressed on the record any belief or concern that defendant might receive parole. The generally phrased request for an explanation did not necessarily signify that jurors espoused any particular belief as to sentencing options. To the contrary, an examination of the entire record reveals that the jury was fully cognizant that there were only two available sentencing options-death and life imprisonment without possibility of parole-and that its solemn responsibility was to choose between them.
>
> First, the language of the instruction and the verdict options suggest that the jury understood both the task at hand and its consequences. In the first part of the instruction, the two sentencing options were correctly stated as death and life imprisonment without possibility of parole. The jury was directed to give the defendant the benefit of any reasonable doubt it might have 'as to which penalty to impose.' Because of the typographical error, the balance of the instruction is both logically inconsistent and physically impossible. The inconsistency is patent: one

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[3] Also, the judge, apparently, wrote on the question sheet presented by the jury; "The court feels the instruction is self-explanatory." CT 2530.

cannot logically give defendant the benefit of a doubt arising between two specified penalties by imposing a third penalty that is obviously less severe than either of the first two.

The physical impossibility arises because the jury was given two verdict forms and was directed to return only one of them as its penalty verdict. One form stated: 'We, the jury in the above-entitled cause, determine the appropriate penalty is Life Imprisonment Without Possibility of Parole and we so fix the punishment.' (Emphasis in original.) The other contained identical language except that the specified penalty was 'Death.' (Emphasis in original.) Thus, the jury could not reasonably have understood the instruction as introducing the prospect of a third verdict-life with parole-as to which it had no directions, instructions, or verdict form. The jury's decision to return the 'Death' form, properly signed and dated by the foreperson and attested to by all 12 jurors upon a poll, indicates that it had no reasonable doubt that death was the proper penalty to be imposed in defendant's case.

Second, from the beginning of the trial to its end, the sentencing options of death or life imprisonment without the possibility of parole were correctly and continually presented to the jury. In addition to individual voir dire, there were over 50 references to the sentencing options by the court and counsel. In each case, the option of life imprisonment without any possibility of parole was correctly stated to the jury.

During individual voir dire, each prospective juror was asked whether he or she could consider the sentencing options of death and life imprisonment without possibility of parole. When the guilt phase began, the sentencing options were again correctly presented both in introductory instructions and in defense counsel's opening statement. At the penalty phase, two lawyers argued for defendant. Together they referred to life imprisonment without possibility of parole some 28 times.

The defense argument focused on the devastating reality that defendant would never leave prison if the jury did not sentence him to death. Counsel stated: 'Let's take a look at the sentence of life imprisonment without the possibility of parole. That sentence means exactly what it says. His Honor, Judge Giffen, will instruct you on that.' He then graphically illustrated the prospect of a life without any possibility of freedom. Positing a series of decades-1990, 2000, 2010, 2020-he gave his own age and that of his children at the beginning of each decade and reminded the jury that defendant would still be in prison. He observed that defendant would receive a more severe sentence than Charles Manson or Sirhan Sirhan who, in contrast to defendant, were sentenced to life imprisonment with possibility of parole. He invited the jury to empathize with defendant who, regardless of the jury's verdict, would die in prison after spending the remainder of his life in a cell less than half the size of the jury box. The refrain was repeated again and again to dramatize the severity of the punishment defendant would inevitably receive even if the jury did not sentence him to death.

The penalty phase instructions mentioned life imprisonment without possibility of parole 11 times, stating it correctly each time. For example, the trial judge not only informed the jury of its sentencing options and their effects, it admonished jurors

> to consider no other possibilities: 'You are instructed that life without parole, that verdict, means exactly what it says. That the defendant shall be imprisoned for the rest of his life. And you are instructed that a death verdict means exactly what it says. That the defendant will be executed. For you to conclude otherwise would be to rely upon speculation or conjecture and would be a violation of your oath as a juror.' (Italics added.) And: 'It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance charged in this case has been specially found to be true.' (Italics added.) And again: 'The choice you make is not simply between good and bad, but between the punishment of life imprisonment without possibility of parole and death.' (Italics added.) And finally: 'To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.' (Italics added.)
>
> Thus, in all of the references to the possible penalties in this case by the court and counsel, only one-the mistyped instruction-incorrectly refers to life in prison with possibility of parole. Even that instruction stated the two alternative penalties correctly in its opening clause. There is no reasonable possibility that the jury ignored all 50 of these references in favor of a single exception which, as we have noted, was both an illogical and impossible verdict.
>
> Third, even the challenged instruction was correctly read to the jury, the error remained only on the typewritten copy. The jury was instructed that the text of the instructions as read to it controlled over delineations or modifications in any written copies of instructions it might request. As discussed above, all of the instructions read to the jury were correct and consistent as to the only two sentencing options.
>
> Focusing on the specific language of the erroneous instruction as a reasonable juror would and considering the context of defendant's trial ( California v. Brown, supra, 479 U.S. at p. 541 [93 L.Ed.2d at pp. 939-940]), we conclude that there was no 'reasonable likelihood' the jury inferred that defendant might receive parole if he were not sentenced to death. (Boyde v. California, supra, 494 U.S. at p. ___ [ 108 L.Ed.2d at pp. 329-330, 110 S. Ct. at p. 1198].)

People v. Morris, 53 Cal. 3d 152, 229-230, 279 Cal. Rptr. 720, 767-768 (1991), disapproved on other grounds, People v. Stansbury, 9 Cal. 4th 824, 38 Cal. Rptr. 2d 394 (1995).

As fully explained below, the reason McDowell does not permit the court to adopt the decision of the state supreme court in this non-AEDPA case[4] in that, with due respect, the

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[4] The Antiterrorism and Effective Death Penalty Act. Thus, the court does not "presume the correctness" of the decision of the state supreme court, or ask whether the decision is an unreasonable application of *U.S. Supreme Court* authority, but rather applies a de novo review. In subjecting the issue to de novo review, this court is bound by the pronouncements of the Ninth

state supreme court asked the wrong question, and therefore, came to the incorrect conclusion. The issue here is not what a "reasonable jury" would have known, but given the on-the-record request for explanation, whether *this* jury was confused, or otherwise had a misperception of the law. In the absence of a jury question, the state supreme court would undoubtedly have been correct in its conclusion that a reasonable jury should not have been confused. For that question, the opinion of the state supreme court is persuasive. However, this jury asked for an explanation of the erroneous jury instruction, and while the state supreme court is again correct that extra-record evidence is inadmissible to show jury confusion, McDowell v. Calderon, 107 F.3d 1351, 1367 (9th Cir. 1997), vacated in part on other grounds, McDowell v. Calderon, 130 F.3d 883 (1997) (en banc), the record itself reflects the confusion. And, the only logical reason to ask a question about the instruction was the very fact that references inconsistent with the possibility of parole had been made.[5] Then, the trial judge expressly told the jury that the written instruction was self-explanatory– thereby significantly diminishing any inference that could be drawn about the correct conclusion from the other instructions and argument.[6]

In McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) the Ninth Circuit addressed the issue of jury confusion during penalty deliberations in a capital case. In McDowell, the jurors had been adequately instructed on the relevant law and they had the written instructions with them. McDowell, 130 F.3d at 835. During deliberations, they sent a note to the trial judge

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Circuit, which might not necessarily be the case if the proceeding herein were governed by the AEDPA.

[5] The assertion by the state supreme court that we do not know why the jury had a question about Instruction 60 begs the obviousness of why any person would have been confused about the written instruction in light of its apparent inconsistency with the other instructions. In addition, the state supreme court appears to believe that the jurors had a question about what decision they were initially allowed to make. Not necessarily so–the jurors may well have been concerned about what would happen if they could not reach agreement, and the "self-explanatory" answer to the second question would have heightened that concern.

[6] Also, while the jury was told that the instructions as read controlled over any instructions with "delineations or modifications," there were none on the written question at issue.

which stated,

> We, the jury in the above entitled action, request the following:
>
> Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.
> 2. Love/hate relationship with father/mother.
> 3. Daily extreme mental and physical abuse by father, also witness to daily abuse to mother and siblings.
> 4. Religious extremes confused defendant.
> 5. Confusing sexual mores at home (incest), with mother condoning or aware of incest/abuse.
> 6. Accused of death of favorite sister.
> 7. Stress of divorce from family.
> 8. Rejection of mother's love during teen years.
>
> Thank you.

McDowell, 130 F.3d at 835.

The trial court responded to the jury's question by stating,

> You're asking me, in essence, to decide the case for you. You have been instructed as to the law and I hate to throw you out like this.
> But if you go back and read the instructions, in particular you have one instruction in which the mitigating and aggravating factors are listed.
> Then you have another instruction, the concluding instruction which reads as follows:
> "One mitigating circumstance may outweigh several aggravating circumstances or one aggravating circumstance may outweigh several mitigating circumstances. You shall give each the weight to which you find it to be entitled."
>
> Those are the two instructions that I think really apply. I would ask you to go back, reread those instructions...

McDowell, 130 F.3d at 835.

After a conference at the bench, the court asked the foreman, "Does that answer your question?" Id. The foreman answered, "Yes, sir." Id.

The Ninth Circuit held that the jury's confusion regarding whether it could consider certain evidence as mitigating and the judge's failure to correct the apparent misconception violated the Eighth Amendment. The Ninth Circuit observed that although the

jurors had been properly instructed, their understanding was as if the trial judge had instructed them to disregard the mitigating evidence proffered on the defendant's behalf. McDowell, 130 F.3d at 837. "Everyone in the courtroom understood that the defendant's mitigating evidence must be considered by the jury; everyone, that is, except eleven of the jurors–the most important participants at that stage of the proceedings." McDowell, 130 F.3d at 837.

The McDowell court went on to analyze whether the error was harmless. First, the risk created by the confusion of the eleven jurors was that they would impose the death penalty in spite of factors which might call for a less severe penalty. McDowell, 130 F.3d at 838. Second, the trial judge did not identify the exact problem confounding the jurors. Id.

> He simply referred the jurors to the original instructions defining mitigating circumstances. The jurors had these instructions with them all along. Both sides agree the instructions were technically flawless. They were, however, the same instructions that for some unknown reason eleven of the jurors did not correctly understand in the first place. Under these circumstances, we agree with Justice Broussard of the California Supreme Court: "There is no point in reiterating language which has failed to enlighten the jury." People v. McDowell, 46 Cal.3d 551, 581, 250 Cal. Rptr. 530, 763 P.2d 1269 (1988) (Broussard, J., dissenting in part.)

McDowell, 130 F.3d at 838.

"Third, even presuming that the jurors read the instructions after returning from their attempt to obtain guidance from the court, the record gives us no assurance whatsoever that they then understood the law." McDowell, 130 F.3d at 838.

The instant case is indistinguishable in principle to McDowell, and in the sense that the jury in petitioner's case herein was referred to a concededly erroneous jury instruction, this case is even more problematic. Here, the jury received a written instruction that contained a typographical error. While this may appear to have been an obvious error to those reviewing the case in hindsight, it was apparently not obvious to this jury. As observed by the California Supreme Court, there were over 50 references to the sentencing options of life without parole and death by the court and counsel. However, despite, and perhaps *because of*, these references, the jury was sufficiently confused by the instruction, relating the opposite of what they thought they

had been told, as reflected by their need for explanation of the "self-explanatory" instruction. Moreover, in light of the jury's concern about "what would happen" if they failed to reach a verdict [at all], the grammatical sense of Instruction 60 suggested that failure to reach a verdict [at all] would result in life with the possibility of parole. Of course, the court's response that the erroneous instruction was self-explanatory confirmed the error. The state supreme court gave no explanation about why the jury would have disregarded the judge's pinpoint advice, and would have rejected the judge's clear confirmation of the error.[7] Jurors are presumed to follow the court's instructions.

Nor can the court find that the correct, albeit somewhat ambiguous, prior reading of the instruction to the jury cured all problems. Obviously, the jurors' question to the judge to explain the instruction indicated that it had not. In addition, the jurors are not expected to have memorized verbatim the instructions that guide their deliberations simply because the instructions were given once, verbally in court. The jurors looked to the uncorrected written instruction for confirmation of the law for a reason, and what they found was the ultimate misperception of what sentence petitioner could receive.

In McDowell, the Ninth Circuit explained the importance of correcting the jury's misperception of the law:

> Jurors' uncorrected confusion regarding the law may lead to verdicts reached outside of the channel required by Godfrey and the Eighth Amendment. The risk was identified in Lockett. The unremarkable prescription for such confusion is that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1956). As the Seventh Circuit has said, Bollenbach places on the trial judge "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem." Davis v. Greer, 675 F.2d 141, 145 (7th Cir. 1982). This duty exists, among other reasons, because "'[i]n a trial by jury..., the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.'" Bollenbach, 326 U.S. at 612, 66 S. Ct. at 405 (quoting Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 698-99, 77 L.Ed. 1321 (1933)). Moreover,

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[7] And, the fact that the law might settle on a life with the possibility of parole sentence, if the jurors could not reach agreement at all on harsher sentences, is not a nonsensical conclusion.

> when constitutional requirements are involved, the proper execution of this duty is a matter of insuring due process of law as guaranteed by the Fourteenth Amendment. Cf. Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed 2d 385 (1991) (jury instruction violates Due Process Clause if it affects an identifiable constitutional rights).

McDowell, 130 F.3d at 838.

Finally, the instruction misrepresented to the jury was not a technical instruction of no significance. The prosecutor had produced evidence of petitioner's criminal record and had argued the potential future dangerousness of petitioner. RT 5287-5288. The written, erroneous instruction by its own terms let the jury know that petitioner could be out in society again. By virtue of their first unanswered question to the judge about what would the sentence be if the jurors could not reach a verdict, combined with the request for an explanation of Instruction 60 which indicated, in part, that petitioner could be paroled, if they could not reach a unanimous verdict on either death or life without parole (not out of the question given the 10-2 split), the jurors demonstrated their unease with the possibility that petitioner could be "out on the street," i.e., the only way to keep petitioner out of society would be to vote for the death penalty. Once it is seen that the instruction posed this problem to the jury, the erroneous, uncorrected, written instruction would have been prejudicial to a reasonable jury.[8]

Finally, the court turns to the issue, not raised by the parties, that the error was "invited" by defense counsel, and therefore is not an actionable error.

In U.S. v. Perez, 116 F.3d 840, 844-845 (9th Cir. 1997) (en banc), the Ninth Circuit held that invited error is reviewed for plain error. However, if an error is both invited and

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[8] Although the record evidence of jury confusion may be (and must be) considered by this court or any reviewing court, taking extra-record evidence upon the actual deliberation of the jury is prohibited. Therefore, this court does not consider the extra-record juror declaration supplied by petitioner indicating that at least one juror was indeed confused, nor could it consider any extra-record evidence by respondent that the jury was not confused. In habeas proceedings, just as in federal trials, the court may not take extra-record evidence on the internal deliberations of the jurors, McDowell, supra (107 F.3d at 1367), nor may the court take evidence to determine the subjective impact of an error on their deliberations . Rodriguez v. Marshall, 125 F.3d 739, 745 (9th Cir. 1997); Jeffries v. Wood, 114 F.3d 1484, 1491 (9th Cir. 1997) (en banc).

involves the intentional relinquishment or abandonment of a known right, then the error is waived and unreviewable. Perez, 116 F.3d at 845. As reflected in the initial quotation from the record, defense counsel proffered the erroneous instruction. However, the instruction was discussed with the court at the conference, and unfortunately, the error was not perceived by anyone–even the judge who read the instruction at that time. It is clear from the colloquy concerning the instruction, and defense counsel's professed belief expressed during final argument that the correct non-death penalty was life *without* the possibility of parole, that the error in Instruction 60 was unintentional. Clearly, the instruction was not proposed as part of a tactical plan of defense counsel. Moreover, the trial judge (momentarily) discovered and rectified the error when he read the instruction to the jury. It was the failure of the court to rectify the error on the written instructions that is the final error of consequence here.

Assuming that the error was invited at all, albeit inadvertent, turning to the final element, i.e., was the error "plain," "'we consider all circumstances at trial including the strength of the evidence against the defendant.'" Perez, 116 F.3d at 847 (quoting United States v. Campbell, 42 F.3d at 1199, 1204 (9th Cir. 1994)). The court considers whether the error warrants correction as "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings." Perez, 116 F.3d at 848 (quoting Olano, 507 U.S. at 736, 113 S. Ct. at 1779). "In the context of plain error review, for an error to affect substantial rights, 'in most cases it means that the error must have been prejudicial.'" Perez, 116 F.3d at 847 (quoting Olano, 507 U.S. at 734, 113 S. Ct. at 1773). "Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong. . ." Id. In the instant case, the court must consider whether the jury would have sentenced petitioner to death had they been properly instructed. This is an almost impossible task for any reviewing court to undertake, but one which nonetheless must be made.

At the time the jury asked the court to explain Instruction 60, the jury was split ten to two. It is, of course, unknown how many of the ten in favor of the death penalty held the

erroneous impression given by the written instruction that petitioner could be paroled.[9] The jury asked the judge regarding the consequences of their failure to reach agreement. In light of these circumstances combined with the seemingly confirmed improper impression that petitioner could be sentenced to life with parole if the jurors could not agree, the court cannot find that petitioner would probably still have been convicted of the death penalty. While the aggravating evidence against petitioner was fairly strong (but weaker or not as egregious than that in many reported cases), significant mitigating evidence was presented, and some jurors clearly had initial doubts as to the appropriateness of the death penalty. After being instructed that, if any juror possessed a reasonable doubt about the harsher penalties, their choice to sentence petitioner to life with parole was self-explanatory, at least two jurors changed their minds. Under these circumstances, the court cannot say that petitioner would have been sentenced to death had the jury been properly instructed. If McDowell is to be followed, the error seriously affected the fairness and integrity of the judicial proceedings.

For these reasons, the COURT RECOMMENDS that the petition be granted as to Claim 36 (in part) and Claim 40.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised

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[9] It is much more likely that the jury was ten in favor of death and two against since the jury ultimately gave a unanimous death verdict.

that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 3, 1998.

GREGORY G. HOLLOWS
U. S. MAGISTRATE JUDGE

GGH:gh:de
morris36-40

kdc

United States District Court
for the
Eastern District of California
March 3, 1998

* * CERTIFICATE OF SERVICE * *

2:92-cv-00483

Morris

v.

Vasquez

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on March 3, 1998, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Exhibit B

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EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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| **BRUCE MORRIS,**<br>Petitioner,<br>v.<br>**ARTHUR CALDERON,**<br>Respondent. | CIV S-92-0483 EJG GGH P |

RESPONDENT'S OBJECTIONS TO THE FINDINGS AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE FILED MARCH 3, 1998

139

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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|---|---|
| **BRUCE MORRIS,** Petitioner, v. **ARTHUR CALDERON,** Respondent. | CIV S-92-0483 EJG GGH P |

Respondent respectfully objects to the findings and recommendations of the Magistrate Judge to the effect that this Court should grant claims 36 (in part) and 40 of the amended Petition for Writ of Habeas Corpus. In these claims, Petitioner alleges he was prejudiced by the trial court's failure to correct an erroneously type-written instruction during his penalty phase. The findings and recommendations omit significant facts and fail to properly analyze whether the alleged error had a substantial and injurious effect or influence on the jury's death verdict in this case. Even if this jury had been

properly instructed in accordance with the correct instruction, it would have returned a verdict of death in Petitioner's case. Review of the Magistrate Judge's findings and recommendations is de novo. *Gordon v. Vasquez*, 859 F. Supp. 413, 416 (E.D. Cal. 1994) disapproved on other grounds in *Calderon v. District Court (Gordon)* 107 F. 3d 757, 761 (9th Cir. 1997); *Smith v. Heckler*, 595 F. Supp. 1173, 1175 (E.D.Cal. 1984).

Briefly, the claims relate to an erroneous copy of a typed instruction that the jury was given after it was correctly instructed during the judge's oral instruction in Petitioner's penalty phase. The erroneously typed instruction read as follows:

> "If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of the doubt and return a verdict fixing the penalty of life in prison **with** the possibility of parole." [emphasis on obvious typographical error added].

Obviously, the instruction should have told the jury that the appropriate penalty was "life without the possibility of parole." Earlier, however, the court read the instruction correctly to the jury and had instructed the jury that the instructions controlled as "read" (1991) regardless of any modifications or delineations to the type-written instructions. *People v. Morris*, 53 Cal. 3d at 231.

After deliberating for a day, the jury returned to court with the following inquiry: "In the event the jury cannot decide 100% on the penalty phase of the case what would be the sentence imposed? Please explain noted page of instructions." The noted page was the above-mentioned instruction with the typographical error.

The trial court answered the jury's question as follows:

> "The statutes provide for what happens in the event that you folks aren't able to reach a decision, but I can't tell you what that is at this point in time. So that's the answer to your first question. I am unable to tell you. The answer to your second question is that I feel as though the instruction itself is self-explanatory. And we would hope with that in mind, that you might be able to reach a decision."

The jury then deliberated approximately four additional hours and the next day returned a verdict of death. *People v. Morris*, 53 Cal. 3d at 22.

Subsequently, the California Supreme Court rejected a claim that Petitioner was prejudiced by the erroneously typed instruction. Based on the entire record, the state high court held that the jurors would not have reached the illogical and impossible conclusion that if the jury deadlocked on the choice of death or life imprisonment without the possibility of parole, that Petitioner would receive only life with the possibility of parole. *People v. Morris*, 53 Cal. 3d at 227-232. The Magistrate Judge, relying on the Ninth Circuit's recent en banc opinion in *McDowell v. Calderon*, 130 F. 3d 833 (9th Cir. en banc 1997), disagrees with the California Supreme Court and recommends that the petition be granted on these claims.

Respondent objects to the findings and recommendations of the Magistrate Judge.

**A. Objections to the Presentation of Facts in the Findings and Recommendations**

The Magistrate Judge's summary of the facts is significantly incomplete in two particulars. First, the Magistrate Judge omits the fact that the jury in this case was also instructed that if Petitioner was sentenced to life imprisonment without the possibility of parole that he would never be released. Second, the Magistrate Judge omits the fact that the jurors were only provided verdict forms that gave them a choice between death and life imprisonment without the possibility of parole. *People v. Morris,* 53 Cal. 3d at 229-230.

**B. Objections to the Conclusion that Petitioner was Prejudiced by the Erroneously Typewritten Penalty Phase Instruction:**

The Magistrate Judge's findings and recommendations should be analyzed and rejected on two levels. First, contrary to the findings, the California Supreme Court correctly found that it was neither reasonably likely nor possible that the jury was mislead by the erroneous instruction. Second, even assuming that the jury did follow the

erroneously typed instruction, the Magistrate Judge's conclusion that Petitioner was prejudiced is wrong.

It is presumed that the jurors follow the court's instructions. F&R at p. 10. Instructions should be construed as a whole and in the context of the entire trial. *Cupp v. Naughton*, 414 U.S. 141, 147 (1973). Furthermore, it is presumed that jurors intelligently deliberate and strive to understand and make sense of the instructions. There is no error if it is not "reasonably likely" the jury construed the instructions in a prejudicial manner. *Boyde v. California*, 494 U.S.370, 380-381 (1990); *United States v. Olano*, 507 U.S. 725, 740 (1993).

Instructions must also be analyzed in terms of the actual thinking process the instructions will engender among the jurors. *California v. Ramos*, 463 U.S. 992, 1003 fn. 17 (1983). It should not be presumed that jurors will act irrationally about their verdict options. *Schad v. Arizona*, 501 U.S. 624, 647-648 (1991); *see also Strickland v. Washington*, 466 U.S. 668, 694 (1984) cited with approval in *People v. Olano*, 740-741. Jurors will reject untenable instructions. *California v. Brown*, 479 U.S. 538, 542-543 (1983) cited with approval in *Boyde v. California*, 494 U.S. at 381.

Petitioner is entitled to relief only if the misinstruction had a substantial and injurious effect or influence in determining the jury's verdict. *California v. Roy*, ___ U.S. ___, 117 S. Ct. 337, 338 (1996). Thus, relief cannot be granted because of the mere "reasonable possibility" the error contributed to the verdict. *Roy v. Gomez*, 81 F. 3d 863, 869 (conc. & dis. opn. of Wallace, C.J.) adopted in *Roy v. Gomez*, 108 F. 2d 242, 243 (9th Cir. 1997) after remand in *California v. Roy*. At the very least, the Petitioner must have suffered "actual prejudice." *Roy v. Gomez*, 81 F. 3d at 869. It is not necessary to establish that the jury necessarily found that death was the appropriate verdict despite the erroneous instructions. *California v. Roy*, 117 S. Ct. at 338.

1. **The California Supreme Court Correctly Found that Petitioner was not Prejudiced by the Erroneously Typewritten Instruction**

The California Supreme Court correctly concluded that Petitioner was not prejudiced by the erroneously typed instruction. It found no "reasonable possibility" or likelihood that the jury was mislead to the "illogical and impossible" conclusion that it was necessary to sentence Petitioner to death or life imprisonment without the possiblity of parole to avoid Petitioner's release on parole. *People v. Morris*, 53 Cal. 3d at 231.[1]

The Magistrate Judge agrees that the California Supreme Court persuasively explained why the jury would not have reached the absurd conclusion that if it could not decide between verdicts of death or life imprisonment without the possibility of parole (hereafter LWOP), that somehow Petitioner would receive a lesser sentence of life imprisonment with the possibility of parole (hereafter LWP). F&R at p. 7. As the state high court noted, the jury had been told repeatedly that there were only two possible sentences in Petitioner's case. All of the arguments of counsel were exclusively directed to the choice between those two sentences. The defense arguments focussed on Petitioner's future dangerousness in prison. The only verdict forms given the jury were for death or LWOP. The trial court had correctly read the instruction to the jury that was later determined to have the erroneous typographical error. As the California Supreme Court explained, the erroneously typed instruction was "both logically inconsistent and physically impossible . . . both illogical and impossible. . . ." *People v. Morris*, 53 Cal. 3d at 229, 231.

The California Supreme Court and the Magistrate Judge part company, however, because of the jury's question to the court that referred to the erroneously typed instruction. F&R at p. 7. The California Supreme Court did not believe that the jury's

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1. The "reasonable possibility" test applied by the California Supreme Court to penalty phase error is a more stringent harmless error test than the "reasonable probability" test. *People v. Brown*, 46 Cal. 3d 432, 446-448 (1988).

question revealed any concern that if the jury deadlocked or "hung," that Petitioner would somehow get the impossible lesser sentence of LWP. Given the entire record, there was no reason to conclude the jury was mislead. *People v. Morris*, 53 Cal. 3d at 229.

The Magistrate Judge believes that the jury's question "beg[ged] the obviousness" of the inconsistency of the erroneous instruction with the other instructions. Since the court told the jury that the erroneous instruction was self-explanatory, the Magistrate Judge concludes that Petitioner was prejudiced. F&R at p. 7 fn. 5.

However, the California Supreme Court's reasoning is more consistent with the standard of review for instructions than the Magistrate-Judge's. The jury's question itself, as the California Supreme Court pointed out, did not indicate the jury's actual concern about the erroneously typed instruction. *People v. Morris*, 53 Cal. 3d at 229.

Respondent submits that the erroneously typed instruction had more than one potential meaning, including a meaning that was not patently irrational. The instruction could also be interpreted as providing that if the jury did not believe beyond a reasonable doubt that either death or LWOP were appropriate penalties for Petitioner, that the sentence received should be LWP. Although the trial court asked the jury about its numerical division before answering the questions, the jury never indicated it was hopelessly deadlocked. The jury's use of the quantification "100%" in its question, indicated that the jury was reading the instruction as pertaining to a situation in which the jury was unconvinced beyond a reasonable doubt that either death or LWP were the appropriate penalty. Given the other instructions and proceedings, this was the only sensible reading of the instruction. There was no reason for the jury to conclude that the defendant should be given the benefit of doubt between two specified penalties "by imposing a third penally that is obviously less severe than either of the first two." *People v. Morris*, 53 Cal. 3d at 229. Such a reading was patently untenable. *California v. Brown*, 749 U.S. at 542-543.

However, even if the jury actually read this instruction, at first blush, as stating that the consequence of a deadlock was that Petitioner would receive the absurd default sentence of LWP, the court's answer to its questions would have compelled it to reconsider such an interpretation. The court admonished the jury that the statute provided for what would happen if it deadlocked, but that the court could not tell the jury what would happen.

As the Magistrate Judge notes, the jury is presumed to follow the instructions. F&R at p. 10. Thus, the jury would have had to conclude that the erroneous instruction was not intended to advise it on the outcome of a deadlock. The court had just told the jury that that result was determined by statute and that the jury could not be told what would happen. The court's response trumped any reading of the instruction as pertaining to a potential deadlock.

Given that admonition, the jury would have had to reinterpret the instruction as advising what the verdict or outcome would be if the jury did not believe that either death or LWOP were appropriate. There is no reason to believe that the jury concluded otherwise. This is the only interpretation that would make sense. Although legally incorrect, such an interpretation favored Petitioner. However, this jury never indicated that it unanimously concluded that there was a reasonable doubt that neither of the harsher penalties was inappropriate.

The Magistrate Judge's findings and recommendations suffer from internal inconsistences. On the one hand, the Magistrate Judge initially agrees with the California Supreme Court that the instruction was illogical and impossible. F&R at p. 7. Yet, the Magistrate Judge later opines that it was "not [] nonsensical" for the jury to believe that if it could not decide between death and LWOP that Petitioner would receive LWP. F&R at p. 10. The Magistrate Judge does not explain how a jury's illogical and impossible reading of an instruction could also be "not nonsensical." The natural conclusion is that an illogical and impossible instruction would also be nonsensical. The

Magistrate Judge concedes that the instruction was illogical and impossible if it was read to ordain a lesser punishment if the jury was unable to choose between two greater punishments. There is no reason to presume that the jury ultimately performed such "nonsensical" mental gymnastics.[2] *California v. Brown*, 479 U.S. at 542-543 (jury would reject "untenable instruction).

The Magistrate Judge also repeats the rule that jurors are presumed to follow instructions. F&R at p. 10. Yet, the findings and recommendations imply that the jury did not follow the trial court's instructions that the results of a deadlock were determined by statute and that the jury was not to be advised of that situation. In the face of this instruction, the jury presumably followed the trial court's instructions and analyzed the erroneously typed instruction in light of those instructions. As unlikely and irrational as it would have been to read the erroneous instruction as ordaining a lesser punishment than the two harsher penalties if the jury could not choose between them, such a reading was unthinkable after the court's answer to the jury's questions. Such a reading would be irreconcilable with the court's admonition that the outcome of a deadlock was determined by statute and that the jury was not to know about it. Obviously, the erroneous instruction was not conveying the procedure that would occur if the jury "hung" between death and LWOP. The trial court had just told the jury that it was not to know about that procedure. The jury would have had to make sense of the instruction in light of the court's answer. The only rational reading was that the instruction was ordaining the sentence Petitioner would receive if the jury did not believe that either death or LWOP were appropriate penalties. There is no reason to presume that the jury simply ignored the court's answers to its questions and persisted in reading the instruction as bearing on the consequences of a "hung jury." Yet, the Magistrate Judge's findings and

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2. As Presiding Justice Puglia of the California Third District Court of Appeal put it in *People v. Cook*, 69 Cal. App. 3d 686 688 (1977): "The law is neither an ass nor an idiot." There is no reason to believe that Petitioner's jury acted like Mr. Bumble in Dickens' Oliver Twist and concluded otherwise.

recommendations indulge in precisely that improper and irrational presumption.[3] There is no "reasonable" likelihood this jury was mislead.

**2. Assuming the Jury Actually Believed that Petitioner could receive LWP if the Jury was Deadlocked as to Death or LWOP, Petitioner was still not Prejudiced**

The Magistrate Judge concluded that the erroneously typed instruction coupled with the trial court's failure to correct the error posed the problem to the jury that the only way to ensure that Petitioner would never be released on the streets was to "vote for the death penalty." F&R at p. 11. It was not improper, of course, for the jury to consider Petitioner's "future dangerousness", including his potential for endangering the public if released. *California v. Ramos*, 463 U.S. at 1003; *People v. Bean*, 46 Cal. 3d 919, 951 (1988)

The Magistrate Judge's conclusion, however, about the jury's "death dilemma" is wrong. To reach this conclusion, the Magistrate Judge fails to consider the instructions as a whole and "ignore[s] the process of thought [the instructions] inevitably engender[ed] in the jury's deliberations." *California v. Ramos*, 463 U.S. at 1003, fn. 17. When this approach is used, it must be concluded that petitioner was not "actually prejudiced."

The premise of the claim is that the jury was split between death or LWOP and that the erroneously typed instruction raised the specter that petitioner would be eligible for parole if the jury did not reach a verdict between the greater sentences of death or LWOP. The claim then posits that once the jury was told by the court that Petitioner would receive LWP unless it chose between the two greater sentences that the jurors who

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3. The Magistrate Judge also minimizes the California Supreme Court's point that the trial court had read the erroneously typed instruction correctly and instructed the jury that the instructions governed "as read" despite any delineations or modifications in the written instructions. *People v. Morris*, 53 Cal. 3d at 231. The court instructed the jury: "You are only to take the text as read to you." CT 26:5332. The Magistrate Judge noted that there were no modifications or delineations "on the written question[sic][instruction] at issue." F&R at p. 7 fn. 6. This is patently false. The written instruction was modified from the instruction as read by the substitution of "life with the possibility of parole" for "life without the possibility of parole."

favored LWOP voted for death as the only way to preclude Petitioner's potential release. It is also necessary to assume that the jurors who favored death were stubbornly determined to vote for that option and force a deadlock even though that meant that the Petitioner would actually receive LWP, not just LWOP. As the Magistrate Judge explains, "[T]he jurors demonstrated their unease with the possibility that petitioner would be 'out on the street', i.e., the only way to keep petitioner out of society would be to vote for the death penalty." F&R at p. 11.

When the instructions are considered as a whole, however, this required reasoning collapses on its own premise. As the California Supreme Court noted, the jury in this case was specifically instructed:

> "You are instructed that life without parole, that verdict, means exactly what it says. That the defendant shall be imprisoned for the rest of his life. And you are instructed that the death verdict means exactly what it says. That the defendant will be executed. For you to conclude otherwise would be to rely upon speculation or conjecture and would be a violation of your oath as a juror."

*People v. Morris*, 53 Cal. 3d at 230.

Thus, this jury was specifically instructed that death was not the only verdict to keep petitioner "out of society". The trial court instructed the jury hat a verdict of LWOP also meant that Petitioner would never be released. Therefore, based on the instructions given, this jury was not confronted with the dilemma posited by the Magistrate Judge--that death was the only verdict that would keep Petitioner out of society. This jury had been specifically instructed exactly to the contrary. The jury was told that if Petitioner received LWOP, he would never be released.

Given these instructions, the only way to explain the Magistrate Judge's finding is to assume that the jurors who favored the death penalty were willing to risk a deadlock and Petitioner's eligibility for parole (LWP) rather than agree to LWOP, thus forcing the LWOP jurors to vote for death. This explanation assumes a level of irrationality on the part of the jurors that is not supported by the record. If the concern of the jury was to

prevent Petitioner's release into society, a death verdict was no better than LWOP given the instructions that LWOP meant that Petitioner would never be released.[4]

The Magistrate Judge assumes that if the jury actually believed that the lesser sentence of LWP was the legally required verdict if the jury could not unanimously choose between death and LWOP, that the jury would impose death rather than LWOP in order to prevent Petitioner's release. Under the circumstances of this case, there is "no basis to assume such irrationality. . . ." *Schad v. Arizona*, 501 U.S. at 624. The jury's "unease" about keeping Petitioner "off the streets" would have been equally quelled by death or LWOP under the court's instructions. Accordingly, the erroneously typed instruction with its mistaken LWP option could not have been the motivating factor in the jury's final verdict based on the instructions in this case. None of the jurors favored a verdict that would result in Petitioner's release.

However, this Court need not engage in the speculation inherent in the Magistrate Judge's findings to conclude that the jury's verdict was ultimately unaffected by the erroneously typed instruction. The jury would have reached the same verdict had the jury been instructed correctly.

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4. Respondents submit that this situation is analogous to the argument rejected by the United States Supreme Court in *Schad v. Arizona*, 501 U.S. 624 (1991). In *Schad*, the defendant argued that the trial court was compelled by *Beck v. Alabama* to instruct on robbery as a lesser included offense. However, the court had instructed the jury on second degree murder as a lesser included offense. The defendant argued that the jury should have been presented the additional option of convicting him of robbery since the jury might have concluded that he was guilty of robbery, but not murder. He asserted that the death verdict was "unreliable" since the jury was not presented the additional option of robbery.

Justice Souter's opinion rejected this contention as follows:

> "The argument is unavailing, because the fact that the jury's 'third option' was second-degree murder rather than robbery does not diminish the reliability of the jury's capital verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second degree murder instruction in this case sufficed to ensure the verdict's reliability." *Schad v. Arizona*, 501 U.S. at 647-648.

It is important to note that the erroneous instruction at issue was not the only erroneous instruction given in this case. Rather, the trial court indulged Petitioner with a series of defense oriented instructions that are not required by state or federal law.[5] Most significantly, the jury was erroneously instructed that LWOP meant that Petitioner would be imprisoned for the rest of his life. As the California Supreme Court has repeatedly held since the trial in this case, this instruction is inaccurate and misleading since a prisoner might be freed due to the postconviction action of the trial court or the Governor's commutation power. See, e.g., *People v. Osband,* 13 Cal.4th 622, 715 (1996) and cases cited therein. It is not true that LWOP means that a prisoner would be imprisoned for the rest of his life. *Ibid.* Yet, this is exactly what the jury was told. Petitioner had no right to this false instruction defining LWOP as meaning he would never be released from prison. *See California v. Ramos*, 463 U.S. at 1009.

This incorrect and misleading instruction was given at the behest of Petitioner's trial counsel. Apparently, defense counsel were concerned that jurors would believe that a prisoner sentenced to life imprisonment without the possibility of parole could still be released. CT IX:2517. Indeed, in 1982, the dissenter in *People v. Ramos*, 30 Cal. 3d 553, 604 (*Ramos* I) stated that "it is likely that most jurors already know of the Governor's commutation power. Several courts have recognized that the availability of parole and commutation in capital cases is readily understood among lay persons [citations omitted]." *Id*. at 604 (Richardson, J. dis.); *see also State v. Quinsenberry*, 381 S.E.2d 681, 688 (N.C. 1989); *People v. Morse*, 60 Cal. 2d 631, 647 (jurors often entertain ideas of parole laws;

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5. For example, the court specifically enumerated all the examples of mitigating evidence for the jury. *Buchanan v. Angleone*, ___ U.S. ___, 117 S. Ct. 757 (1998). The court instructed that "age" was only mitigating. *Tuilaepa v. California*, 512 U.S. 967 (1994). The court permitted the untethered use of sympathy and compassion as mitigating circumstances. *California v. Brown*, 479 U.S. 538 (1987). The trial court also instructed the jury to apply a reasonable doubt standard to imposing the death penalty. *Harris v. Pulley*, 692 F. 2d 1189, 1195 (9th Cir. 1982); *People v. Rodriguez*, 42 Cal. 3d 730, 777-779 (1986). The trial court also gave a "lingering doubt" instruction. *Franklin v. Lynaugh*, 487 U.S. 164, 172-176 (1988). Moreover, the trial court incorrectly excluded evidence of petitioner's previous escape conviction. RT XXV: 5054; *People v. Boyde*, 46 Cal. 3d 212, 249-250 (1988); CT 26:5335, 5337, 5339, 5341-5342.

*California v. Ramos*, 463 U.S. at 1004, fn. 19 ("Although. . .most jurors may have a general awareness of the availability of commutation and parole. . . .); *People v. Hunter*, 49 Cal.3d 957, 981 (1989). Even the majority in *Ramos I* would only question whether "jurors are generally aware of the *scope* of the Governor's commutation power. . . ." *Ramos I,* at 600 [emphasis added]. Petitioner's counsel apparently assumed that "jurors might otherwise be aware of the possibility of commutation" and asked for this inaccurate, preemptive instruction defining LWOP. *See People v. Ramos,* 37 Cal. 3d 136, 159 fn. 12 (1984) (*Ramos II*).

Had the jury been properly instructed, there would have been no elaboration on death or LWOP beyond the terms themselves. The jury would have also been told that if there was a reasonable doubt as to death or LWOP, it should impose LWOP. However, the jury would have received no false guarantees that Petitioner would be imprisoned for the rest of his life if LWOP was imposed. Thus, to the extent that keeping Petitioner "out of society" was the decisive factor in this case for this jury--then a death verdict would have been the only possible verdict. The compulsion to reach a death verdict and remove the potential that somehow someday petitioner might be back on the streets would have been as strong with the correct instructions as it was under the regime of erroneous instructions given in this case. *See California v. Ramos*, 463 U.S. at 1011 ("A jury concerned about preventing the defendant's potential return to society will not be less inclined to vote for the death penalty upon learning that even a death sentence may not have such an effect.")

Respondent submits that no matter what prompted the jury's question concerning the court's erroneously typed instruction and the outcome if the jury did not reach a verdict on either death or LWOP, the possibility that Petitioner would be released if the jury did not impose those two sentences could not have been the motivating factor for the jury's ultimate death verdict. In choosing between death and LWOP, the jury was concerned with preventing Petitioner from ever endangering the general public. Under

# PUBLISHER'S NOTE:

**THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:**

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## CONCLUSION

Respondent respectfully requests that this Court reject the Magistrate Judge's findings and recommendations and deny claims 36 (in part) and 40. Respondent also requests this Court to not issue a final judgment in this matter until the Magistrate Judge has made findings and recommendations on the remaining claims in the amended petition.

Dated: April 2, 1998.

Respectfully submitted,

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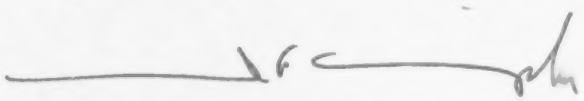

WARD A. CAMPBELL
Deputy Attorney General

Attorneys for Respondent

## DECLARATION OF SERVICE BY MAIL

Re: *Morris v. Calderon* No. CIV S-92-0483 EJG GGH P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

**RESPONDENT'S OBJECTIONS TO THE FINDINGS AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE FILED MARCH 3, 1998**

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Tony Tamburello, Esq.
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Each said envelope was then, on April 2, 1998, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 1998, at Sacramento, California.

**DECLARANT**

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 97-1414

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ARTHUR CALDERON, Warden

Petitioner,

v.

CHARLES E. MCDOWELL, JR.,

Respondent.

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## CERTIFICATE OF SERVICE

I, Andrea G. Asaro, a member of the Bar of this Court, hereby certify that on this 8 th day of April, 1998, I caused one copy of Request for Judicial Notice of Petitioner's Judicial Admission in the above-entitled case to be mailed by overnight Federal Express, to all parties required to be served in this matter, as indicated on the attached list. I declare under penalty of perjury that the foregoing is true and correct. Executed this 8 th day of April, 1998, at San Francisco, California.

By: _____
ANDREA G. ASARO

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